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In the Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, AND DANIEL B. LEVINE, ACTING DIRECTOR, BUREAU OF THE CENSUS, PETITIONERS

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

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QUESTION PRESENTED

Whether lists of addresses collected and utilized by the Bureau of the Census in fulfilling its duties under the Census Act, 13 U.S.C. 1 *et seq.*, are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552.

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The Solicitor General, on behalf of the Secretary of Commerce and the Acting Director of the Bureau of the Census, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. A, *infra*, 1a-2a) is not reported. The oral opinion of the district court (App. D, *infra*, 6a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a-2a) was entered on December 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Exemption 3 of the Freedom of Information Act ("FOIA"), 5 U.S.C. 552(b)(3), provides:

> [FOIA] does not apply to matters that are—
>
> * * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

Section 8(b) of the Census Act, 13 U.S.C. 8(b), provides in pertinent part:

> Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent * * *.

Section 9(a) of the Census Act, 13 U.S.C. 9(a), provides in pertinent part:

> Neither the Secretary [of Commerce], nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

STATEMENT

On August 12, 1980, respondent filed this suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, in the United States District Court for the District of New Jersey. Respondent sought disclosure of the master address register compiled by the Bureau of the Census with regard to Essex County, New Jersey.[1] He alleged that he intended

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[1] The master address register is a spiral-bound book systematically listing, *inter alia*, addresses, householder's names, number of housing units at the street address, type of census inquiry, Bureau of the Census serial number, number of per-

to use these addresses to check the accuracy of the 1980 decennial census in Essex County (App. D, *infra*, 6a-8a, 10a-12a). The government resisted disclosure, claiming that 13 U.S.C. 8(b) and 9(a) prohibit disclosure of all census data pertaining to particular individuals, including addresses, and that therefore the Bureau could lawfully withhold the information pursuant to Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).

On August 27, 1980, the district court granted respondent's motion for summary judgment. In an oral opinion, the district court held that Sections 8(b) and 9(a) "d[o] not provide a blanket of confidentiality for any and all census materials; instead, the confidentiality requirement is structured solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response" (App. D, *infra*, 9a-10a). Because respondent allegedly intended to use the census data in order to participate in the Local Review Program developed by the Bureau in conjunction with the 1980 decennial census,[2] the court concluded that the address list

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sons in each unit, and, where applicable, the vacant status of the unit. Each enumeration district throughout the country has its own master address register. There are approximately 800 enumeration districts in Essex County. The list of addresses included in the master address register is compiled from commercial mailing address lists, census postal checks, preenumeration canvassing by census personnel, and direct inquiries during the census enumeration itself. In some cases, the 1980 lists were also crosschecked against 1970 census data.

[2] The Local Review Program was developed by the Census Bureau to allow local government officials an opportunity to review and comment on the Bureau's population and hous-

is not confidential, at least with regard to respondent. The court also stated (*id.* at 11a-12a) that respondent's intent to use the address list for statistical purposes distinguished this case from *Seymour* v. *Barabba*, 559 F.2d 806 (D.C. Cir. 1977), in which the court of appeals upheld the Bureau's claim of confidentiality regarding similar census data. In addition, the court observed that the address data sought by respondent "is not derived from the questionnaires received, but rather, data available prior to the commencement of the census process" (App. D, *infra*, 12a-13a).

The district court accordingly ordered petitioners to turn over the address list to respondent and his agents, but only after swearing such persons to observe the confidentiality requirements of the Act, in accordance with 13 U.S.C. 23(c). See App. F, *infra*, 17a. The court further directed petitioners to consider any data submitted by respondent within 10 working days of his obtaining the address lists (*ibid.*). Finally, the district court stayed its order pending appeal (App. G, *infra*, 18a).

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ing tabulations before those figures become final. Accordingly, in August and September 1980, petitioners supplied Essex County and its subdivisions with the Bureau's "working figures" (C.A. App. 5). Respondent was thereafter required to submit any data demonstrating inaccuracies or other problems within 10 working days of receipt of the working figures (*id.* at 20-35). Respondent never submitted any data to the Bureau, although localities within Essex County did participate in the Local Review Program. Previously, respondent proposed that the Bureau consider its "disorganized list" of addresses that would have required an inordinate amount of effort to reconcile with the Bureau's master list (App. D, *infra*, 8a-9a; C.A. App. 42-43). ("C.A. App." refers to the appendix filed in the court of appeals.)

On appeal, the court of appeals summarily affirmed "for the reasons stated by the district court" (App. A, *infra*, 2a).[3]

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the confidentiality of the raw data collected by the Bureau of the Census in order to conduct the decennial census. The courts below have held that the Census Bureau's master address register must be disclosed to the public under the Freedom of Information Act, 5 U.S.C. 552, at least where the party requesting disclosure of the data alleges that he intends to challenge the accuracy of the census. That conclusion cannot be reconciled with the language and history of Sections 8(b) and 9(a) of the Census Act, 13 U.S.C. 8(b) and 9(a), and is in conflict with the decision of the District of Columbia Circuit in *Seymour* v. *Barabba*, 559 F.2d 806 (1977). Moreover, because strict confidentiality is essential to ensuring public cooperation with and voluntary participation in the nationwide censuses, and because the confidentiality of census data is the subject of substantial litigation at this time, review by this Court is warranted.

1. The Freedom of Information Act ("FOIA") establishes that a federal agency may not improperly withhold agency records from public disclosure. See

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[3] The court of appeals agreed to stay the district court's order until December 8, 1980 (App. A, *infra*, 2a). In the interim, the government sought a stay of the district court's order from this Court. On December 4, 1980, Justice Brennan granted a stay pending further order (No. A-490). On December 15, 1980, the Court, with two Justices dissenting, continued the stay pending the timely filing and final disposition of a petition for a writ of certiorari.

5 U.S.C. 552(a)(4)(B); *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980); *Forsham* v. *Harris*, 445 U.S. 169, 177 (1980); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). An agency record may be withheld, however, when the requested material falls within one or more of the nine statutory exemptions set forth in 5 U.S.C. 552(b). See *CPSC* v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 18; *FOMC* v. *Merrill*, 443 U.S. 340, 351-352 (1979). This case involves Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), which provides that an agency need not disclose matters that are "specifically exempted from disclosure by statute * * * provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

Sections 8(b) and 9(a) of the Census Act, which govern the confidentiality of census data, unquestionably qualify as Exemption 3 statutes. Section 8(b) provides that, although the Secretary of Commerce may publish aggregate statistical tabulations, he may "not disclose the information reported by, or on behalf of, any particular respondent [to the census]." 13 U.S.C. 8(b). And Section 9(a) confirms that the Secretary and his employees may not "make any publication whereby the data furnished by any particular establishment or individual under this title can be identified" or "permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports." 13 U.S.C. 9(a). Because Sections 8(a) and 9(b) thus establish a flat ban on disclosure of

census data relating to individual persons or establishments, both statutes fall within the plain terms of Exemption 3. *Seymour* v. *Barabba, supra,* 559 F.2d at 807-809. See *CPSC* v. *GTE Sylvania, Inc., supra,* slip op. 18-20.

In any event, the legislative history of the FOIA leaves no doubt that Congress intended Exemption 3 to preserve the confidentiality of census data. Thus, Congress considered "census information" (104 Cong. Rec. 6550 (1958) (remarks of Rep. Moss)) to be privileged and confidential under Section 3 of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002, which, as this Court observed in *EPA* v. *Mink,* 410 U.S. 73, 79 (1973), was the predecessor statute to the FOIA. See also S. Rep. No. 1621, 85th Cong., 2d Sess. 9 (1958); 104 Cong. Rec. 6548-6550 (1958) (remarks of Reps. Brown, Meader, and Moss); *Freedom of Information and Secrecy in Government: Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 85th Cong., 2d Sess., Pt. 2, 986, 1001 (1958). In enacting the FOIA in 1966, Congress completely revised Section 3 of the APA. In doing so, however, Congress was aware that "[t]he Bureau of the Census can only gather the information that it does gather because that information will be held confidential or the sources of information will be confidential." 112 Cong. Rec. 13646 (1966) (colloquy between Rep. Olsen and Rep. Moss, sponsor of the bill). Accordingly, Congress made clear that Exemption 3 "would exempt the Bureau of the Census from" the disclosure requirements of the FOIA. *Ibid.* See also S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *Freedom of Information: Hearings on*

S. 1666 and S. 1663 (in part) Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 6 (1963).

Furthermore, in 1976, Congress amended the FOIA in light of this Court's decision in *Administrator* v. *Robertson*, 422 U.S. 255 (1975), in order to restrict the scope of Exemption 3.[4] Government in the Sunshine Act, Pub. L. No. 94-409, Section 5(b), 90 Stat. 1247. See H.R. Rep. No. 94-880, 94th Cong., 2d Sess., Pt. I, 22-23, and Pt. II, 14-15 (1976); H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 14 (1976). The pertinent legislative debates, however, again reflect continuing congressional concern that "all census information be kept secret" and that all data collected under "the Census Act, [which] requires the Census Administrators to keep all information secret, * * * will not be subject to disclosure." 122 Cong. Rec. 24211 (1976) (remarks of Rep. McCloskey). In short, as Rep. Abzug, a manager of the bill in the House explained, "confidentiality of the census * * * is protected under" amended Exemption 3. 122 Cong. Rec. 24211 (1976). See also *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808.

2. The courts below nonetheless concluded that respondent is entitled to disclosure of the Bureau's master address list because he allegedly intends to use that list for statistical purposes related to the

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[4] In *Robertson*, the Court concluded that the discretionary nondisclosure provisions of Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. 1504, constituted an Exemption 3 statute. The 1976 amendment narrowed the scope of Exemption 3 to include only nondisclosure statutes that are nondiscretionary or that specify sufficiently definite criteria for withholding certain kinds of records. The Census Act establishes a non-discretionary ban on the disclosure of all census data relating to particular individuals or establishments and hence falls within 5 U.S.C. 552(b)(3)(A).

accuracy of the 1980 decennial census (App. D, *infra*, 9a-12a; App. A, *infra*, 2a). But a requester's need or proposed use of governmental data is irrelevant as to whether the records in question must be disclosed under the FOIA. See, *e.g.*, *FOMC* v. *Merrill*, *supra*, 443 U.S. at 362-363; *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n.23 (1978); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10, 149 n.16 (1975); *EPA* v. *Mink*, 410 U.S. 73, 86 (1973). In other words, respondent's right to disclosure of census data pursuant to the FOIA is no greater than the right of any other member of the public. Furthermore, as we now demonstrate, the language and legislative history of the Census Act make clear that census data relating to individual persons or establishments may not be disclosed to any person or governmental agency outside of the Bureau of the Census, regardless of its intended use.

a. Section 8(b) of the Act states unequivocally that the Secretary may publish statistical tabulations based on the underlying census data, but may "not disclose the information reported by, or on behalf of, any particular respondent." 13 U.S.C. 8(b). Section 9(a), in turn, imposes additional limitations on the use and publication of census data, specifically prohibiting (1) the use of census data for noncensus purposes, (2) the publication of census material in a fashion that could identify the data supplied by any particular establishment or individual, and (3) the inspection of census reports by persons other than the sworn personnel of the Bureau. See 13 U.S.C. 9(a).[5] These sweeping provisions prohibit the dis-

[5] All Bureau employees must be sworn to observe the confidentiality provisions of the Act. See 13 U.S.C. 9, 23(c). Violation of these provisions is subject to substantial criminal penalties. See 13 U.S.C. 214.

closure of the master address register sought by respondent. See *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 215-218 (1961); *Seymour* v. *Barabba*, *supra*, 559 F.2d at 807-808; 36 Op. Att'y Gen. 362 (1930).

As respondent concedes (Mem. in Opp. to the App. for a Stay at 3 n.*), the master address register contains substantial confidential information regarding individual persons and establishments, including names, number of housing units and persons per household at each address, the vacant or occupied status of each unit, and the manner in which the census information was obtained for a particular address (C.A. App. 38, 42). See note 1, *supra*. Furthermore, even if the master address register could readily be redacted to produce a bare list of addresses,[6] disclosure of that list would run afoul of both the letter and spirit of Sections 8(b) and 9(a). Many addresses are added to the master address register solely as the result of responses by individuals to census inquiries. In addition, publication of a list of addresses would reveal various unlawful or untaxed dwellings, *e.g.*, the occupancy of "abandoned" dwellings or the residential use of lofts zoned only for commercial purposes.[7] Disclosure of such information,

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[6] We are informed that a list of addresses could be culled from the master address register only by copying the thousands of pages constituting the master address register and by manually redacting the substantial amount of information found over much of each page of the register.

[7] Accordingly, respondent's contention that "[t]here is nothing confidential about a list of street numbers" (Mem. in Opp. to the App. for a Stay at 3) is without merit. In any event, Sections 8 and 9 of the Act broadly refer to all census

particularly to the local government, would inevitably result in a decline in the candor and cooperation so essential to the census process.

The conclusion of the courts below that the master address list should nevertheless be disclosed under the FOIA apparently rests on Section 9(a)(1) of the Census Act. That provision states that Census Bureau personnel may not "use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied." 13 U.S.C. 9(a)(1). The district court's oral opinion, which was summarily affirmed by order of the court of appeals, suggests that respondent's intended use of the census data is a "statistical purpose[] for which it is supplied." See App. D, *infra*, 8a-13a; App. A, *infra*, 2a. But Section 9(a)(1) plainly limits the use of census data to *Bureau* personnel for the *Bureau*'s own statistical purposes, not the statistical purposes of a local governmental official or other person seeking to challenge the accuracy of the census.[8] Moreover, all use and publica-

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data and information regarding any individual or establishment and not just information that may be embarrassing or private in nature.

[8] Respondent argues that he needs the address list to participate meaningfully in the Local Review Program created by the Census Bureau to aid in the 1980 decennial census. That program, as noted above (see note 2, *supra*), permits local governments to submit data in useful form to the Bureau. It does not and could not authorize the Bureau to submit raw census data to the local governments. Moreover, the program was created not by statute but by the Census Bureau itself, and the program contains no provision for "discovery" to allow local governments more "meaningful" participation than the Bureau has chosen to provide. We further note that

tion of census data authorized by Section 9(a) is expressly subject to the flat ban set forth in Section 8(b) regarding the disclosure of any "information reported by, or on behalf of, any particular respondent" to the census. See 13 U.S.C. 9(a) ("except as provided in Section 8 of this title").[9]

b. The legislative history of the Census Act confirms that the master address register or any other census information pertaining to individual persons or establishments is not subject to disclosure. The initial census statutes required the public posting of the actual census schedule of results in each district.

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although several thousand localities, including jurisdictions within Essex County, participated in the Local Review Program without inspecting the Bureau's address registers, respondent failed to submit timely and useful information to the Bureau as required by the Local Review Program guidelines (C.A. App. 42-43, 51-52).

[9] The district court attempted to circumvent the plain language of Sections 8(b) and 9(a) by directing the Bureau to deputize respondent's employees as sworn officers of the Bureau and by ordering petitioners to consider as timely under the Local Review Program any submission by respondent following his inspection of the address registers (App. F, *infra*, 17a). It is doubtful whether the FOIA, which was enacted to permit unfettered public disclosure of nonexempt agency records (see *CPSC* v. *GTE Sylvania, Inc.*, *supra*, slip op. 6), authorizes the district court to order such extraordinary relief. See *Kissinger* v. *Reporters Committee for Freedom of the Press*, *supra*, 445 U.S. at 154. But cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 16-20 (1974); *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971). It is inconceivable, for example, that under the FOIA a district court could order the CIA to "deputize" a member of the public in order to allow limited inspection of national security secrets. In short, we submit that the district court's protective order reflects the confidential nature of the census data that respondent seeks to inspect.

See Act of Feb. 28, 1800, ch. 12, Section 7, 2 Stat. 13; Act of Mar. 26, 1810, ch. 17, Section 7, 2 Stat. 567-568; Act of Mar. 14, 1820, ch. 24, Section 7, 3 Stat. 552. Subsequently, however, Congress reacted to the public's apparent concern over the general disclosure of census data (see, *e.g.*, S. Misc. Doc. No. 41, 41st Cong., 2d Sess. (1870)), and, in 1879, it directed each enumerator to take an oath "not [to] disclose *any information* contained in the *schedules*, *lists*, or statements" used in the decennial census. Act of Mar. 3, 1879, ch. 195, Section 7, 20 Stat. 475 (emphasis supplied). See, *e.g.*, Act of Mar. 1, 1889, ch. 319, Section 8, 25 Stat. 763; Act of Mar. 3, 1899, ch. 419, Sections 7, 18, and 21, 30 Stat. 1015, 1019, 1020.

Morever, since 1879, both Congress and the executive officials responsible for conducting the census have repeatedly and uniformly expressed the view that all raw census data, including lists and schedules containing any information about an individual person or establishment, must be kept strictly confidential. Thus, Section 25 of the Act of July 2, 1909, ch. 2, 36 Stat. 9, the predecessor to Section 9(a) of the current Act, provided that "[n]o publication shall be made by the Census Office whereby the data furnished by any particular establishment can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports." And the House Report accompanying the 1909 version of the Census Act reflected with clarity Congress' understanding that complete confidentiality of "all schedules and other information officially obtained" was essential to the vitality and efficacy of the census. H.R. Rep. No. 960, 60th Cong., 1st Sess. 5 (1908). See also, *e.g.*, *id.* at 23; 36 Op. Att'y Gen. 362 (1930).

In revising and amending the census laws on several occasions since 1909, Congress has continued to preserve and to strengthen the appearance and fact of confidentiality that is essential to the census process. See, *e.g.*, Act of Apr. 2, 1924, ch. 80, Section 3, 43 Stat. 31; Act of June 18, 1929, ch. 28, Sections 8 and 21, 46 Stat. 23, 26; Act of July 25, 1947, ch. 331, Section 3, 61 Stat. 458; Act of Aug. 31, 1954, ch. 1158, 68 Stat. 1013-1014; S. Rep. No. 2497, 83d Cong., 2d Sess. 2, 10 (1954); H.R. Rep. No. 1980, 83d Cong., 2d Sess. 10 (1954). In 1962, for example, Congress promptly overruled this Court's decision in *St. Regis Paper Co.* v. *United States*, *supra*, which had held that a copy of a census report retained by a business establishment was not immune from judicial process. See Act of Oct. 15, 1962, Pub. L. No. 87-813, 76 Stat. 922. The pertinent Senate Report observed that the amendment was necessary "to clarify[] the intent of the Census Act in order to provide the protection of confidentiality" that is "vital to its effectiveness." S. Rep. No. 2218, 87th Cong., 2d Sess. 2, 4 (1962).

More recently, Congress has repeatedly acknowledged that the Census Act establishes a blanket prohibition on the publication or disclosure of any census information other than statistical tabulations. In addition to the legislative history of the FOIA described above (pages 7-8, *supra*), Section 3(b)(4) of the Privacy Act of 1974, 5 U.S.C. 552a(b)(4), and the legislative history accompanying the Privacy Act evidence this point. Section 3(b)(4) states that the Privacy Act does not prohibit the dissemination of records regarding any individual to the Bureau of the Census. The congressional reports explain that such dissemination does not interfere with individual privacy because the census "laws prohibit publication

of data gathered by the Bureau in identifiable form and strictly govern confidentiality." S. Rep. No. 93-1183, 93d Cong., 2d Sess. 70 (1974). See, *e.g.*, *id.* at 5, 12; H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 3, 12-13, 25 (1974); *Sale or Distribution of Mailing Lists By Federal Agencies: Hearings on H.R. 8903 and Related Bills Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 38, 62-63 (1972); *Special Inquiry on Invasion of Privacy: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess., Pt. 1, 276, 283, 284-286 (1965).

Finally, the 1976 amendment to the Census Act itself squarely refutes respondent's contention that the Bureau's master address register is not covered by the confidentiality provisions of the Act. At that time, Congress amended Section 8 "to add further protection of privacy." S. Rep. No. 94-1256, 94th Cong., 2d Sess. 3 (1976). See Act of Oct. 17, 1976, Pub. L. No. 94-521, Section 6, 90 Stat. 2460. The Senate Report explains that Section 8, as amended, "ensures that the authority of the Secretary of Commerce to furnish statistical tabulations or other material to *public* and private *entities* does not extend to any material which *might* disclose information reported by, or on behalf of, any respondent." S. Rep. No. 94-1256, *supra*, at 4 (emphasis added). See H.R. Conf. Rep. No. 94-1719, 94th Cong., 2d Sess. 10-11 (1976). Congress thus did not intend to give public entities such as Essex County any greater right of access to census data than any other member of the public.[10] In

[10] Indeed, not even other federal agencies, including the FBI, have access to census data such as the master address register. See H.R. Rep. No. 93-1416, *supra*, at 12-13; 36 Op. Att'y Gen. 362 (1930).

addition, it is apparent that the master address register constitutes census "material which might disclose information reported by, or on behalf of," Essex County residents. In sum, the decision below egregiously misconstrues the confidentiality provisions of the Census Act.[11]

3. The erroneous decision of the court of appeals is squarely at odds with the decision of the District of Columbia Circuit in *Seymour* v. *Barabba*, *supra*. In *Seymour*, the court of appeals held that "names and *addresses* * * * utilized by the Bureau of the Census in fulfilling its duties under the federal census laws are specifically protected from disclosure by Exemption 3 of the Freedom of Information Act and the relevant provisions of the census laws." 559 F.2d at 807 (emphasis added; footnote omitted). In contrast to the court below, the District of Columbia Circuit carefully reviewed the language and legislative history of both the FOIA and the Census Act, and it concluded that Sections 8(b) and 9(a) of the Act constitute "a flat barrier to disclosure with no exercise of discretion permitted." 559 F.2d at 808. Compare also *City of Hobbs* v. *Klutznick*, No. 80-792-JB (D.N.M. Nov. 17, 1980) (census address lists

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[11] Particularly in light of Congress' repeated approval of and acquiescence in the Bureau's view that its list of "addresses * * * c[o]me[s] under the protection of the confidentiality provisions of section 9, title 13" (*Hearings on H.R. 8903*, *supra*, at 212), the court of appeals should have deferred to the agency's longstanding and consistent administrative interpretation. See, *e.g.*, *EPA* v. *National Crushed Stone Ass'n*, No. 79-770 (Dec. 2, 1980), slip op. 18-20; *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 595-596 (1980); *Board of Education* v. *Harris*, 444 U.S. 130, 148-149 (1979).

held confidential), with *McNichols* v. *Klutznick*, No. 80-C-1151 (D. Colo. Sept. 17, 1980) (address lists not confidential), appeal pending, No. 80-2023 (10th Cir.), and *Carey* v. *Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. Dec. 29, 1980), appeal pending, No. 81-6042 (2d Cir.) (same).

The district court suggested (App. D, *infra*, 11a) that *Seymour* is distinguishable because in that case the FOIA requester sought the address list for commercial purposes, whereas here respondent seeks similar data for "statistical" purposes. But we have previously explained that the Census Act establishes "a flat barrier to disclosure" (559 F.2d at 808) and that the identity of an FOIA requester is irrelevant to the exempt nature of the requested material. See page 9, *supra*. Section 9(a)(1) of the Census Act prohibits the use of census data by Bureau personnel except for *the Bureau's* statistical purposes in fulfilling its statutory responsibility, and does not purport to permit any public disclosure whatsoever. Likewise, the district court erroneously indicated that the master address register is not confidential because "the information being sought is not derived from the questionnaires received, but rather, data available prior to the commencement of the census process" (App. D, *infra*, 12a-13a). In fact, however, many addresses are added to the master register as the result of individual responses to census inquiries both prior to and during the actual enumeration process. Furthermore, the D.C. Circuit correctly determined in *Seymour* that the fact that portions of the Bureau's lists of "addresses are acquired or supplied from sources other than the specific reporting establishments" is simply irrelevant to the disclosure question involved in this FOIA case. See 559 F.2d at 808-809.

4. As this Court has recognized, strict confidentiality of census data is essential to ensure public cooperation with and voluntary participation in the nationwide census. *St. Regis Paper Co.* v. *United States, supra*, 368 U.S. at 218. See also *Seymour* v. *Barabba, supra*, 559 F.2d at 808; *Heathman* v. *United States District Court*, 503 F.2d 1032, 1036-1037 (9th Cir. 1974) (Chambers, J., concurring); *LaMorte* v. *Mansfield*, 438 F.2d 448, 452 (2d Cir. 1971); *FTC* v. *Dilger*, 276 F.2d 739, 744 (7th Cir.), cert. denied, 364 U.S. 882 (1960); *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568, 569-570 (S.D.N.Y. 1958). The decision below, if left standing, will breach the Bureau's longstanding and unequivocal promise of confidentiality and will frustrate the congressional intent underlying Sections 8 and 9 of the Census Act. As a result, the constitutionally and statutorily mandated collection of accurate census data, which is already a difficult, expensive, and time-consuming process, may be substantially impeded.

Moreover, the important issue of the confidentiality of census data is a recurring one. In addition to the conflict among the lower courts described above (see pages 16-17, *supra*), the Bureau's construction of Sections 8 and 9 of the Census Act is currently being challenged in various other cases across the country. See, *e.g.*, *City of Philadelphia* v. *Baldrige*, No. 80-3172 (E.D. Pa. Dec. 5, 1980), appeal pending, No. 80-2785 (3d Cir.); *Holland* v. *Baldrige*, No. 80-73302 (E.D. Mich.); *State of New Mexico* v. *Baldrige*, No. 80-0726-C (D.N.M.); *County of Dona Ana* v. *Baldrige*, No. 80-676 (D.N.M.). Accordingly, review by this Court is warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

LEONARD SCHAITMAN
MICHAEL KIMMEL
Attorneys

FEBRUARY 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2466

SHAPIRO, PETER, Essex County Executive

vs.

KLUTZNICK, PHILIP M., Secretary, U.S. Department of Commerce, and VINCENT P. BARABBA, Director, U.S. Bureau of the Census, APPELLANTS

Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil No. 80-02638)

Argued December 1, 1980

Before: ALDISERT, HUNTER and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed generally for the reasons stated by the district court, Supplemental Appendix 1-12. The mandate of the court shall issue December 8, 1980.

Costs taxed against appellants.

BY THE COURT

/s/ R. J. Aldisert

Circuit Judge

Attest:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

Dated: Dec. 1, 1980

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 6, 1980

No. 80-2466

SHAPIRO, PETER, Essex County Executive

vs.

KLUTZNICK, PHILIP M., Secretary, U.S. Department of Commerce, and VINCENT P. BARABBA, Director, U.S. Bureau of the Census, APPELLANTS

Present: ALDISERT, HUNTER and HIGGINBOTHAM, *Circuit Judges.*

1. Motion by appellants for reconsideration of this Court's order dated October 31, 1980.
2. Copy of this Court's order dated October 31, 1980, sent by the undersigned for the Court's information,

in the above-entitled case listed for disposition on the merits on Monday, December 1, 1980.

Respectfully,

/s/ Sally Mrvos
Clerk

ngp
enc.

The foregoing Motion is denied.

By the Court:

/s/ Aldisert
Judge

Dated: November 24, 1980

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 27, 1980

No. 80-2466

SHAPIRO, PETER, Essex County Executive

vs.

KLUTZNICK, PHILIP M., Secretary, U.S. Department of Commerce, and VINCENT P. BARABBA, Director, U.S. Bureau of the Census, APPELLANTS

(D.C. Civil No. 80-2638)

Present: ALDISERT, HUNTER and HIGGINBOTHAM, *Circuit Judges.*

1. Motion by appellee to vacate stay of the district court order dated October 21, 1980, and compel the Bureau of Census to allow immediate access to its street address data under the terms of the trial court's order, *or, alternatively,* to order a conference between the parties for adoption of the data-sharing plan pending determination of the appeal,

in the above-entitled case listed for disposition on the merits on Monday, December 1, 1980.

Respectfully,

/s/ Sally Mvros
Clerk

mgp
enc.

The foregoing Motion to vacate stay is GRANTED.

By the Court:

/s/ Aldisert
Judge

Dated: October 31, 1980

APPENDIX D

[Oral Opinion of the United States District Court for the District of New Jersey Dated Aug. 27, 1980]

* * * *

THE COURT: As I have just stated both parties have requested that the Court treat this matter as a cross motion for summary judgment and because of the important time limitation imposed upon the County I am prepared to do that.

This is an action to compel disclosure of the address lists used by the Bureau of the Census, Department of Commerce, for delivery of the 1980 Census Forms in Essex County, New Jersey.

A Freedom of Information Act Request for this information was made and denied.

The Bureau of the Census has developed a list of addresses in connection with the 1980 Census from commercial mailing lists, postal lists and other sources.

The list had been used to mail and otherwise deliver the 1980 Census forms in Essex County.

Plaintiff contends that to the extent the Bureau's list omits addresses the Bureau may have failed to count housing units and residents which may in turn result in an unjustified but substantial loss of funds to local Governments and a diminution and crippling of essential public programs, and because Congressional and Legislative apportionment also depends on Census results, an under-count may also result in an unjustified loss of representation for County residents.

Because of past disputes over the accuracy of its count the Bureau has instituted a program of local review. The program gives local Government officials ten working days to provide the Bureau with data

challenging the accuracy of preliminary housing and head counts.

Receipt of the preliminary counts from the Bureau triggers the start of a ten day period. The preliminary data for Newark was received on August 1st, 1980. That preliminary data apparently shows a loss of more than 70,000 residents since 1970.

Unless this loss of population is successfully contested it may mean a loss of millions of dollars annually in Federal Benefits for the County and the city.

Data for the remainder of the County is expected to be received sometime in the next two weeks. In order to be able to participate in the local review process, Essex County alleges that it has developed its own comprehensive list of addresses. The list was developed from municipal tax records and is alleged to contain every street address in the County.

The list was prepared to enable the Counties to determine whether the Bureau's list of addresses is sufficient.

Plaintiff contends that unless the County gains access to the Bureau's list its own list is worthless and the County will be unable to participate in a meaningful [*sic*] in the local review process.

The Bureau refuses access to its address register on the grounds of confidentiality.

Plaintiff does not seek access to individual Census Reports nor information relative to particular individuals.

In reaching its decision in this matter the Court has considered all of the affidavits which were submitted and in particular the following excerpts:

Mr. Nick Koval is a planner in the Division of Planning, Department of Planning and Economic Development, County of Essex, he was chiefly respon-

sible for compiling a list of street addresses in Essex County to be used in conjunction with the Census.

I quote from his affidavit, paragraph 4:

"The Bureau refuses to use our tax records to compile its address list. We offered to make our records available for that purpose in the fall of 1979 when the Bureau was in the process of compiling its list."

Quoting from paragraph 5:

"We intend to use the Bureau's address solely in order to determine whether the Bureau missed addresses already known to us. We can make that determination by having a computer read the County's list and the Bureau's list and divulge only those addresses that do not appear on the Bureau's list." The Court also considered the affidavit of Mr. George E. Hall, who is an associate director for Demographic Fields, U.S. Bureau of Census.

In paragraph 2C the following appears:

"In urban areas of the United States the 1980 Census was conducted by a mail out-mail back procedure. Registers are maintained of all addresses to which a form was mailed.

If by mid April a form had not been returned and that fact noted in the address register an enumerator was assigned to follow-up that address.

Later on in his affidavit Mr. Hall identifies the list of addresses as the master address register."

The Court also considered specifically the affidavit of Donald R. Dwyer, a survey statistician in the Census Division, Bureau of the Census. I quote from paragraph 4 of his affidavit:

"While it is theoretically possible to reconcile Essex County's entire disorganized list with the Bureau's address registers, the burden on the Bureau would be untenable, the cost would be large and

the time spent by the limited Census staff would seriously distract them from their duties related to completing the census."

I note, however, that it appears that the County is prepared to undertake that analysis and does not at least at this time request that the Bureau do so. In enacting the Freedom of Information Act Congress sought to promote broad public access for information within the control of the Government; EPA v. Mink, 410 U.S. 73 (1973).

In the instant case plaintiff seeks to enforce his rights pursuant to the Administrative Procedures Act, 5 USC section 552(a), to compel disclosure by the Bureau of the Census of address registers used by the Bureau in conducting its 1980 decennial census.

Consistent with the public policy favoring disclosure rather than secrecy plaintiff's request must be granted unless the information falls within one of the nine statutory exemptions to disclosure; Department of the Air Force v. Rhodes [*sic*], 425 US 352, 1976.

Defendants assert that the information sought by plaintiff falls within an exemption to the Freedom of Information Act authorizing non-disclosure of materials which are specifically exempted from disclosure by statute; 5 US Code section 552(a) 6-C, D3; in other words, the defendant takes the position that the act does not require disclosure if there is a specific statute which prohibits such disclosure, and in that respect the defendant relies upon Title 13.

Title 13, however, does not provide a blanket of confidentiality for any and all census materials; instead, the confidentiality requirement is structured

solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response. 13 US Code section 9 requires that the Bureau not "use information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied or make any publication whereby the data furnished by any particular establishment or individual under this title can be identified, or, 3, permit anyone other than the sworn officers and employees of the Department or Bureau or agency thereof to examine the individual's reports."

Plaintiff does not seek an access to individual reports nor does he seek access to any information that would identify the data furnished in a particular report by a particular individual. Plaintiff seeks data exclusively for statistical purposes in conjunction with the Bureau's own program of local review.

Furthermore, with respect to material which is specifically exempted from disclosure the secretary is authorized pursuant to 13 USCA section 23 (c) to utilize County employees in performing its work provided such employees are sworn to observe the limitations of the statute.

In the instant case the Bureau of the Census has established a local review program to assist it in developing its data. Plaintiff's request for the address registers utilized by the Bureau in its furtherance of its participation in this program.

By comparing a mailing list used by the Bureau with its own comprehensive list the County will be able to identify missed buildings and ultimately missed individuals in the Census count.

Without this list the County would be unable to provide the hard data necessary to challenge the Bureau count.

The Bureau's refusal to release the requested information appears to be based on a Circuit Court opinion in Seymour v. Barabba, 559 Fed. 2d, 806, DC Circuit 1977.

Unlike the instance case plaintiff in Seymour was not seeking disclosure for statistical purposes; rather, plaintiff there sought names and addresses for the purposes of sending notice to potential class members in an anti-trust action.

Moreover, the plaintiff sought disclosure not just of addresses but of names and addresses of companies which the Bureau had placed in twenty-one substantive categories. These categories described the business of the firms listed and, hence, obviously reflected the information provided by the company in their census reports.

The confidentiality provisions of Title 13 were enacted to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interest; U.S. v. Thesela Hems Field Corporation [*sic*], 21 FRD 568, SDNY 1958.

The disclosure of such lists as requested in this matter for statistical purposes does not reach the disclosure of the confidentiality provisions of Title 13.

Furthermore, by claiming confidentiality for such materials the Bureau of the Census impedes the goal of accurate and complete enumeration which the confidentiality provisions were designed to further.

Unless the County is able to compare its address lists with those used by the Bureau of the Census it will be unable to pinpoint discrepancies arising from this address.

The Court finds that rather than violating the statute, submission of the requested information carries out the policies and purposes of the legislation; the information is not being sought for any purposes other than to verify facts and aid in the accuracy of the census.

The system of local review would be rendered meaningless if this type of information were not made available. And in that respect I would like to quote from an exhibit which was offered in this matter prepared by the United States Department of Commerce, Department of the Census. It is the information booklet pertaining to the local review program.

"The local review program is one of several Census Bureau efforts especially designed to improve the completeness and the accuracy of the 1980 Census. Its purpose is to allow for the review of population and housing counts by local Government officials before the count becomes final and while Census District Offices are open and able to check reported discrepancies. Local review is aimed at improving the accuracy of the census by helping to pinpoint such major problems as clusters of missed housing units, geographic misallocations resulting in housing units or group quarters being recorded in an incorrect location or incorrectly located geographic boundaries. It is hoped that most local areas will have their own data on the number of housing units and estimate for the institutional population in the community and its sub-areas to compare with the census count."

As I have said, that comes right from the Bureau's own brochure on the purpose of the local review program.

Furthermore, the Court finds that the information being sought is not derived from the questionnaires

received, but rather, data available prior to the commencement of the census process. Counsel for the Government suggests that some additional information is now contained on the master address list but that in no way changes the Court's determination.

The goal of plaintiff's request is to furnish to defendant information that it does not have, rather than make use of information that the Bureau has acquired. No information is sought which does not have a statistical purpose.

According to defendant's own brief the principal responsibility of the Bureau is the compilation of comprehensive current and reliable data. One wonders why the Bureau, rather than the County, is not the applicant in this matter.

In commenting on a similar matter in New York The New York Times in an editorial said the following:

"Both sides are after the same thing: The most accurate possible tabulation of the population. Then what are they doing in Court? Why aren't they working together to attain their shared goals?"

And this Court asks the same question.

Accordingly, an order will be entered directing the Bureau to make available to the plaintiff the address register of all properties located in Essex County with this proviso: That all persons utilizing said records shall take the oath of confidentiality prescribed in the statute.

I suggest counsel submit a form of order.

* * * *

APPENDIX E

[Excerpt of Transcript of Hearing on Sept. 22, 1980, in the United States District Court for the District of New Jersey, pp. 8-10]

* * * *

THE COURT: Let me tell you what my ruling would be on your application for additional relief. I would grant your application for a technical description of the Bureau's computerized data as well as the data on the number and organization of addresses on the Bureau's non-computerized updates and the Bureau's master address register, and I say that for the following reason:

If there is anyway that the comparison could be completed without reference to anything other than the address information that the Bureau has, that would be the Court's first preference, therefore, the furnishing of this information might make such a comparison possible and probable.

I will not permit at this juncture any depositions, particularly not pending the appeal.

MR. WEISTREICH: Thank you, Judge.

THE COURT: You have a third item, access to the Bureau's computerized addresses and non-computerized updates. I think that follows number one as well; in other words, we never got to the technical method of making the comparison, but I think that whatever could be done particularly by cooperation which would avoid even access to anything other than the addresses ought to be accomplished and to the extent that the Census Bureau could give you the preliminary outline of what they have I think that would carry out the purpose.

MR. WEISTREICH: I think that was implicit in your Honor's order, it was just the way the order was prepared, it was written in terms of access solely to master—I wanted to make it clear that the access was to the substantive information.

THE COURT: I recall that someone urged if you had the use of the computer tapes the matter could be programmed so that the County's tapes and the Census tapes could be compared and what they would do as a result would specify those addresses that were in the possession of the County and not the Census and that information would be turned over and that was the ultimate goal of this whole procedure.

MR. WEISTREICH: Absolutely correct.

THE COURT: By doing that no one will have the opportunity to look at anything other than the addresses themselves.

* * * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 80-2638

PETER SHAPIRO, Essex County Executive,
PLAINTIFF

v.

PHILIP M. KLUTZNICK, Secretary
U.S. Department of Commerce,

VINCENT P. BARABBA, Director,
U.S. Bureau of the Census,
DEFENDANTS

ORDER OF JUDGMENT

This matter being opened to the Court on Complaint of Peter Shapiro, for an Order directing the Bureau of the Census to permit access to its list of street address for Essex County pursuant to the Freedom of Information Act; and the Court having heard the argument and considered the evidence presented by the parties on their cross-motions for summary judgment, Robert Westreich, Esq., appearing for plaintiff and G. Donald Haneke, Assistant U.S. Attorney, appearing for defendants; and for good cause shown, and for the reasons expressed by the Court in its oral opinion rendered August 28, 1980;

IT IS, on this 29 day of Aug., 1980,

ORDERED AND DECLARED by way of Final Judgment that:

1. Defendants shall make available to plaintiff and his agents the Bureau's Master Address Register for use in connection with the Local Review Program;

2. Any person granted access to the Master Address Register pursuant to this Order shall be sworn pursuant to 13 USC § 23(c);

3. Any data developed by plaintiff as a result of access to the Master Address Register and submitted to the Bureau within ten working days after access is obtained, shall be used and considered by the Defendants as though such data were timely submitted pursuant to the Local Review Program.

/s/ H. Lee Sarokin
H. LEE SAROKIN
U.S.D.J.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 80-2638

PETER SHAPIRO, Essex County Executive,
PLAINTIFF

vs.

PHILIP M. KLUTZNICK, Secretary
U.S. Department of Commerce,

VINCENT P. BARABBA, Director,
U.S. Bureau of the Census,
DEFENDANTS

CONSOLIDATED ORDER

This matter being opened to the Court on motion of the Defendants for reargument, alteration of the judgment, and a stay pending appeal; and on motion of Plaintiff for additional relief and discovery, G. Donald Haneke and Anne Singer, Assistant U.S. Attorneys appearing for Defendants, and Robert Westreich, Assistant County Counsel appearing for Plaintiff; and the Court having heard argument, and for the reasons expressed by the Court in its oral opinions of September 11th and September 22, 1980,

IT IS, on this 21 day of October, 1980,

ORDERED THAT:

1. The Court's Order of August 29, 1980, is hereby stayed pending appeal including ¶ 4, 5 & 6 hereof;

2. The period of the stay shall not otherwise limit or prejudice the rights granted to Plaintiff pursuant to the Order of August 29, 1980.

3. The Defendants shall, within seven (7) days of the date of this Order, file a motion with the Court of Appeals for the Third Circuit, to expedite the hearing of this matter;

4. Access to street address records shall include access to the Defendants' computerized records in addition to the Master Address Registers. Any street address records disclosed to Plaintiff and his agents shall, to the full extent possible, be edited to permit disclosure solely of street address data.

5. Plaintiff and his agents shall use the address data produced solely for the purposes of the Local Review Program. Such data shall not be used or disclosed to any other person for any other purpose whatsoever, and the Defendants shall have the right to monitor Plaintiff's use of such data.

6. Within 7 days of the date of this Order, the Defendants shall provide Plaintiff with the following:

a. The technical data needed to read and utilize the Bureau's computerized street address records;

b. Data on the number and organization of those Essex County street addresses which do not appear in the Bureau's computerized records; and

c. Data on the number and organization of street addresses in the Bureau's Master Address Register for Essex County.

7. In all other respects, the Defendants' motion for reargument and alteration and the Plaintiff's motion for discovery and additional relief are denied.

/s/ H. Lee Sarokin
H. LEE SAROKIN
U.S. District Judge

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FILED
JUL 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1436

In the Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, SECRETARY OF COMMERCE and
DANIEL B. LEVINE, ACTING DIRECTOR,
BUREAU OF THE CENSUS,
Petitioners

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 23, 1981
CERTIORARI GRANTED APRIL 27, 1981

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL DOCKET

DATE	NR.	PROCEEDINGS
8-15-80	1	Complaint filed, 3-12-80.
8-15-80	2	Affidavit of Luna I. Mishoe filed, 8-12-80.
8-15-80	3	Affidavit of Daniel Boggan, Jr., filed 8-12-80.
8-15-80	4	Affidavit of Robert Westreich filed, 8-12-80.
8-15-80	5	Letter re no issuance of summons filed, 8-12-80.
8-15-80	6	Order to show cause extending time for local review of the Census for Essex County, ret. 8-25-80, filed 8-14-80. (Thompson) Notice mailed.
8-15-80	7	Notice of Allocation and Assignment filed. (Newark-Lacey)
8-18-80		Hearing on plaintiff's application for temporary restraining order and Order to show cause. Ordered application for temporary restraining order denied. Ordered Order to show cause to be returnable 8-25-80, in Newark before Judge Sarokin. (Thompson) (8-13-80)
8-18-80	8	Transcript of proceedings of 8-13-80, re temporary restraining order, filed 8-15-80.
8-28-80		At call for hearing on plaintiff's application to extend time for local review of the Census of Essex County, Court indicated application moot. (Sarokin) (8-27-80)
8-28-80		Hearing on defendants' application for summary judgment for disclosure of census bureau address list. Ordered application granted. Order to be submitted. (Sarokin) (8-27-80)
8-28-80		Ordered all persons utilizing said records shall take the oath of confidentiality prescribed in the statute. Order to be submitted. (Sarokin) (8-27-80)

DATE	NR.	PROCEEDINGS

9-4-80 9 Affidavit of Donald R. Dwyer, filed 8-29-80.

9-4-80 10 Order granting disclosure of Bureau of Census Master List, with costs in favor of plaintiff, Peter Shapiro, Essex County Executive and against defendants, Philip M. Klutznick, Secretary U.S. Department of Commerce and Vincent P. Barabba, Director, U.S. Bureau of Census, filed 8-29-80. (Sarokin) Notice mailed.

9-8-80 11 Notice of motion of defendants for stay pending determinating of motion for reconsideration and alteration of judgment, returnable 9-11-80, statement in lieu of brief and affidavit of service, filed 9-5-80.

9-9-80 12 Notice of motion of defendants for an order granting re-argument of the court's 8-29-80 order and vacating and altering that judgment, returnable 10-14-80, statement in lieu of brief and affidavit of service, filed 9-5-80

9-12-80 Hearing on application by defendant of court ruling re inspection of Census Bureau address list by Census of Essex County. Ordered application denied. Ordered Government has until September 19 1980 to determine whether or not to file an appeal. (Sarokin) (9-11-80)

9-18-80 13 Notice of motion of plaintiff for an order granting additional relief returnable 9-19-80 and proof of mailing, filed 9-17-80. (Brief Submitted)

9-22-80 14 Notice of motion of defendants for stay pending appeal, returnable 9-22-80, statement in lieu of brief and affidavit of service, filed.

9-22-80 15 Affidavit of William Hill, filed.

9-23-80 16 Notice of appeal of defendants, Philip M. Klutznick and Vincent P. Barabba, filed 9-22-80 at 9:50 A.M.

9-23-80 Copies of notice of appeal sent to U.S.C.A. and David H. Ben-Asher, U.S. Attorney.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DATE	FILINGS—PROCEEDINGS

1980

October 10 Certified copy of Notice of Appeal received September 26, 1980, filed.
Record received October 9, 1980, filed.
Brief for appellants, rec'd October 15, 1980, filed. (25cc)
Service of brief and appendix by mail on 10/10/80 attached.

Oct. 15 Motion by appellants for expedited consideration of appeal, with consent of appellee, in which it requests that oral argument be scheduled during the first week of November, 1980 and that the Court render its decision as soon thereafter as possible, *and* in which it states that the appellees' brief will be filed not later than October 28, 1980 and appellants' reply brief will be filed by November 3, 1980, filed. (4cc) Service attached.

Oct. 15 Submitted on above motion. Clerk.

Oct. 16 Appendix, filed. (10cc)

Oct. 17 Order (Clerk) granting the above motion to the extent that briefing will be expedited and the case will be listed for argument at the earliest convenience of the Court; directing that appellee's brief is to be filed no later than October 28, 1980 and appellants' reply brief, if any, must be filed by November 3, 1980, and stating that no extensions of time will be permitted, filed.

Oct. 17 Appearance of Robert Westreich, Esq., for appellee, filed.

Oct. 22 Appearance of Leonard Schaitman and Michael Kimmel, Esqs., for appellants, filed.

Oct. 23 Motion by appellee to vacate stay of the district court order dated October 21, 1980, and compel the Bureau of Census to allow immediate access to its street address

DATE	FILINGS—PROCEEDINGS

1980

date under the terms of the trial court's order or, alternatively, to order a conference between the parties for adoption of the date-sharing plan pending determination of the appeal, filed. (4cc) Service attached.

Oct. 27 Submitted on above motion. Coram:

Oct. 28 Brief for appellee, filed. (25cc) Service by mail on 10/28/80 attached. Certification of bar membership requested 10/28/30.

Oct. 28 Opposition by appellants to appellee's motion to vacate stay or to grant alternative relief, filed. (4cc) Service attached.

Nov. 3 Reply brief for appellants, rec'd November 7, 1980, filed. (25cc) Service by mail on 11/3/80 attached.

Oct. 29 First Supplemental Record (No. 17), filed.

Oct. 31 Order (*Aldisert*, Hunter and Higginbotham, C.J.) granting the motion by appellee to vacate stay (filed 10/23/80), filed.

Oct. 31 Certified copy of above order to Clerk of D.C.

Nov. 3 Clerk's letter, written at the direction of the Court, to Robert Westreich, Esq., counsel for appellee, directing him to file a supplemental appendix setting forth specifically the statement of reasons given by the District Court set forth in the trial record but not included in the appendix, within seven days.

Nov. 6 Motion by appellants for reconsideration of this Court's order dated October 31, 1980, filed. (4cc) Service attached.

Nov. 6 Submitted on above motion. Coram: Aldisert, Hunter and Higginbotham, C.J.

Nov. 10 Opposition by appellee to appellants' motion for reconsideration, filed. (4cc) Service attached.

DATE	FILINGS—PROCEEDINGS

1980

Nov. 10 Supplemental appendix by appellee, rec'd in response to Clerk's letter of November 3, 1980, filed. (10cc)

Nov. 13 Response by appellants to appellee's opposition to appellants' motion for reconsideration, rec'd for the information of the Court. (4cc) Service attached.

Nov. 17 Letter dated November 14, 1980 from Robert Westreich, Esq., counsel for appellee, rec'd for the information of the Court. (4cc) Service attached.

Nov. 21 Letter dated November 20, 1980 from Robert Westreich, Esq., counsel for appellee, requesting the earliest possible decision on the government's motion for reconsideration, so that enforcement of the trial court's order can proceed, rec'd for the information of the Court. (4cc)

Nov. 21 Order (Aldisert, C.J.) directing 10 minutes argument time for each side, filed.

Nov. 24 Order (*Aldisert*, Hunter and Higginbotham, C.J.) denying appellants' motion for reconsideration of this Court's order dated October 31, 1980, filed.

Nov. 24 Certified copy of above order to Clerk of D.C.

Dec. 1 Argued. Coram: Aldisert, Hunter and Higginbotham, C.J.

Dec. 1 Letter dated November 24, 1980 from Michael Kimmel, Esq., counsel for the Government, together with copy of decision rendered November 17, 1980 in a case entitled *City of Hobbs, et al.* v. *Philip M. Klutznick, et al.* in the District Court for the District of New Mexico, rec'd for the information of the Court. (2cc of letter & 4cc of enclosure)

Dec. 1 Judgment Order (*Aldisert*, Hunter and Higginbotham, C.J.) affirming the judgment of the district court generally for the reasons stated by the district court, Supplemental Appendix 1-12; directing that the mandate shall issue December 8, 1980; with costs taxed against appellants, filed.

DATE	FILINGS—PROCEEDINGS

1980

Dec. 3 Letter dated December 2, 1980 from Robert D. Westreich, Esq., counsel for appellee, requesting a transcript of the oral argument in this Court, rec'd.

Dec. 5 Clerk's letter to Robert D. Westreich, Esq., counsel for appellee, confirming that he had been granted leave, on December 3, 1980, to have a Court Reporter make a transcript of the oral argument in this case on December 1, 1980; and also advising that he forward an original of this transcript to be placed in the file of this case.

Dec. 8 Transcript of the oral argument held in this Court on December 1, 1980, rec'd for the information of the Court.

Dec. 8 Order (Chief Deputy Clerk), by direction of the Honorable Ruggerio J. Aldisert, staying the issuance of the mandate of this Court for sixty (60) days from the date of this order, filed.

Dec. 8 Certified copy of order dated December 4, 1980 staying the execution and enforcement of the order of the United States District Court for the District of New Jersey, Civil Action No. 80-2638, entered August 29, 1980, pending further order of the undersigned (William J. Brennan, Jr., Associate Justice of the S.C. of the U.S.) or the Court, rec'd from Clerk of S.C., filed. (S.C. No. A-490)

Dec. 8 Second Supplemental Record, filed.

1981

Feb. 13 Order (Chief Deputy Clerk), by direction of Aldisert, C.J., further staying the issuance of the mandate until 3/5/81, filed.

Mar. 2 Notice—Cert. filed in S.C. on 2/23/81, filed. (S.C. No. 80-1436)

Apr. 30 Order—Cert. granted 4/27/81, filed. (S.C. No. 80-1436)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-2638

PETER SHAPRIO,
Essex County Executive, PLAINTIFF

v.

PHILIP M. KLUTZNICK,
Secretary, U.S. Department of Commerce, and
VINCENT P. BARABBA,
Director, U.S. Bureau of the Census, DEFENDANTS

COMPLAINT

JURISDICTION

1. This is an action pursuant to 5 U.S.C. ¶ 552, The Federal Freedom of Information Act, for the disclosure of the address lists used by the Bureau of the Census, Department of Commerce, for mailing and delivering 1980 Census Forms. Jurisdiction is predicated on 5 U.S.C. 552(a)(4)(B).

PARTIES

2. Plaintiff, Peter Shapiro is County Executive of Essex County, the Chief Administrative and Executive officer of the County which is a political subdivision of the State of New Jersey. He sues in his official capacity and as a citizen and taxpayer of the United States.

3. Defendant, Philip Klutznick is the Secretary of the United States Department of Commerce and is responsible for administration of the Bureau of the Census within the Department of Commerce. He is sued in his official capacity.

4. Defendant, Vincent P. Barabba is Director of the United States Bureau of the Census and is sued in his official capacity.

ALLEGATIONS

5. The 1980 Census is the decennial census mandated by Article 1, Section 2 of the United States Constitution. The Census tallies, *inter alia*, the number of housing units and people living in defined geographical areas, including counties, municipalities, and Enumeration Districts.

6. The Census is critically important to urbanized counties like Essex and their municipalities. The results of the Census are used to apportion congressional and state legislative seats and to allocate billions of dollars of Federal funds through more than 100 federal programs. Unless the Census accurately determines County housing and population characteristics the interests of the County, its municipalities and residents may be grievously disserved.

7. Because of past disputes over the accuracy of the Census, the Bureau of the Census has established a Local Review Program "designed to improve the completeness and accuracy of the 1980 Census. Its purpose is to allow for the review of population and housing counts by local government officials, before the counts become final and while census district offices are open and able to check reported discrepancies." United States Department of Commerce, Bureau of the Census, *Revised Local Review Program Information Booklet*, April 1980.

8. Local Review Program rules require that the Census district offices, be provided with "hard" data indicating counting errors within ten working days of receipt by local government of preliminary housing and population counts.

9. Preliminary counts for the City of Newark were received on August 4, 1980. The data indicates a loss

of population from 381,930 in 1970 to 308,960 in 1980 and a loss of housing units from 127,000 in 1970 to 120,000 in 1980. Plaintiff believes that both the housing and population figures may represent substantial undercounts for the City of Newark. The loss of population indicated by the Bureau's preliminary data may mean a loss of as much as $11 million annually in federal funds to the county.

10. Preliminary counts for the remaining municipalities in Essex County are expected to be received sometime between August 10 and August 20, 1980.

12. In order to participate fully in the local review process and to assure an accurate count of housing and population, Essex County has developed a comprehensive list of street addresses within the County. It is the County's intention to compare its list with the list used by the Bureau of Census for delivery of its Census Forms in order to determine whether the Bureau has reached all sites of housing units within the County.

13. To complete this project, the County has repeatedly sought to obtain the list of addresses used by the Bureau for the mailing and delivery of its 1980 Census Forms. The Bureau's public information office, its General Counsel's office, its regional office and the local district offices have all been contacted in an effort to obtain this information.

14. The Bureau, however, refuses access to this material. Attached as Exhibit A, is a letter from Paul J. Burke, legal advisor of the defendant Bureau, setting forth the Department of Commerce's final response to these inquiries, denying access on grounds of confidentiality.

15. The data sought by plaintiffs does not fall within any of the exceptions to the Freedom of Information Act 5 USCA 552 et seq. Plaintiffs are entitled to have access to this information and defendants' refusal to allow access is illegal.

IRREPARABLE INJURY

16. Plaintiffs are entitled to injunctive relief under 5 USCA 552. Plaintiffs are also faced with irreparable injury unless access to this data is provided and unless the time for local review is tolled. Plaintiffs will be unable to review the Bureau's preliminary population and housing data and will be unable to report discrepancies to the Bureau within the allotted ten day time period.

RELIEF

WHEREFORE, Plaintiffs demand judgment

1. Enjoining defendants from withholding the address lists used to mail and deliver the 1980 Census Forms within Essex County, New Jersey.
2. Ordering Defendants to produce forthwith the above described records.
3. Tolling the time for local review of the preliminary census count for Essex County until production of such records.
4. Awarding Plaintiffs reasonable attorneys' fees.
5. Awarding such other relief as may be appropriate.

DAVID H. BEN-ASHER
Essex County Counsel
Essex County Hall of Records
Newark, New Jersey
(201) 961-7075

By: /s/ Robert Westreich
ROBERT WESTREICH
Assistant County Counsel

EXHIBIT "A"

[SEAL]

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20233

August 5, 1980

Robert Westreich, Esquire
Essex County Council
Hall of Records
Newark, New Jersey 07102

Dear Mr. Westreich:

This is in response to our telephone conversation regarding the confidentiality of the address registers used by the Bureau of the Census in conducting the 1980 Census of Population.

The address register is made up of addresses purchased commercially and addresses obtained by Census employees by personally interviewing respondents. All of this information is gathered under the provisions of title 13, United States Code. Under section 9 of that title, information obtained must be kept confidential. Section 214 provides a penalty for any Census employee who would disclose such information, including addresses.

I am enclosing two court decisions (*Seymour* v. *Barabba*, 559 F.2d 806 and *United States* v. *International Business Machines Corp.*, 66660 1975-2 (Trader Cases) which concern the confidentiality of Census data and which you might find of interest.

Sincerely,

/s/ Paul J. Burke
PAUL J. BURKE
Legal Adviser
Bureau of the Census

Enclosures

EXHIBIT B

[SEAL]

COUNTY OF ESSEX
OFFICE OF THE COUNTY COUNSEL

DAVID H. BEN-ASHER
County Counsel

Hall of Records
Newark, New Jersey 07102
201-961-7077

August 1, 1980

Mr. James Lincoln
Bureau of Census
Department of Commerce
Washington, D.C. 20233

Dear Mr. Lincoln:

This is a request for information under the Freedom of Information Act, 5 USCA § 552. Kindly provide the following documents and information:

— For Essex County, New Jersey, for each municipality within the county, and for each Enumeration District within the county, a list of all addresses to which 1980 census forms were mailed or otherwise delivered.

— For Essex County, New Jersey, for each municipality within the county, and for each Enumeration District within the county, the number of addresses to which 1980 census forms were mailed or otherwise delivered.

This information is sought so that the county will be able to participate in a meaningful way in the local review process. We anticipate receiving some of our preliminary data within the next ten days and, hence, it is essential that we receive the requested information in that time.

Thank you for your cooperation in this matter.

Very truly yours,

DAVID BEN-ASHER
County Counsel

BY /s/ Robert Westreich
ROBERT WESTREICH
Assistant County Counsel

RW:RG

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE, PLAINTIFF

vs.

PHILIP M. KLUTZNICK, SECRETARY,
UNITED STATES DEPARTMENT OF COMMERCE, DEFENDANTS

AFFIDAVIT

STATE OF NEW JERSEY)
) SS
COUNTY OF ESSEX)

LUNA I. MISHOE, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am Director of the Division of Planning of the County of Essex, New Jersey and am responsible for development of the County's housing and population data in connection with the 1980 census.

2. The list of addresses sought by the County through this litigation is essential for meaningful review of the preliminary housing and population counts prepared by the Bureau of the Census. Only by comparing the Bureau's list with the list developed by the County can we determine whether each potential housing site in the County has been identified by the Bureau.

3. The need for local review of the Bureau's determinations is substantial. The Bureau itself reports an undercount of some 10 million people in the 1970 census. Siegel, J., *Coverage of Population in the 1970 Census and Some Implications for Public Programs*, U.S. Bureau of the Census (1975).

4. Substantial sums of money are at stake in the Bureau's determinations. Essex County receives more

than $73 million annually in federal funds allocated at least in part according to census data. It is estimated that more than $150 in federal money is lost to the County for each person missed by the Census and, hence, a significant undercount can mean the loss of vast sums of money and a crippling of essential public service programs. The preliminary data for Newark, for example, indicating a loss of roughly 73,000 residents since 1970, may mean a loss of $11 million annually in federal benefits or $110 million during the next 10 year period.

5. The municipalities located in the County also receive direct federal funding and, hence, the total amount of money allocated to the benefit of Essex County residents far exceeds the $73 million noted above. Any loss of federal dollars due to a significant undercount will impede and cripple important public service programs. Undercounting within the County can be a major contributor to overall decline of the economy, environment and health of the County.

6. In addition, Congressional, Freeholder and State Legislative districts must be redrawn if substantial undercounts result. Of immediate concern is the Congressional representation. Each district currently represents approximately 478,000 people. This determination is based upon 1970 census data. With a projected loss of approximately 75,000 people from Newark, several additional contiguous towns must be redistricted as a part of the 10th district or Newark will be cut up into other congressional districts. Either way political representation will be reduced considerably at a time when it is most needed to overcome its urban problems.

7. We have made repeated efforts over the past several months to obtain the Bureau's address lists. Twice during June 1980 and twice more in July, the local district offices, the regional office in New York, and the Bureau's Washington D.C. office have been contacted in an effort to obtain the address list we seek. We have been repeatedly refused access and were finally notified on

August 5, 1980 by the Bureau's legal advisor that access would be denied on grounds of confidentiality.

8. The local review process requires that local officials identify the errors in the Bureau's data and identify the Enumeration Districts in which the errors appear. Unless the County implements its own housing unit census, an impossibility in view of our resources, it will be unable to participate meaningfully in local review without access to the Bureau's address lists.

9. The County has developed its own address list from municipal tax records and has included in that list, so far as we can determine, every street address in the County. We intend to compare the Bureau's list to our own in order to determine whether the Bureau has missed any addresses and, hence, any housing units and people.

/s/ Luna I. Mishoe
LUNA I. MISHOE

Sworn to and Subscribed before me
this 11 day of August, 1980.

/s/ [Illegible]
An Attorney at Law
in the State of New Jersey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No

PETER SHAPIRO, Essex County Executive
PLAINTIFF

v.

PHILIP M. KLUTZNICK, Secretary
U.S. Department of Commerce

VINCENT P. BARABBA, Director
U.S. Bureau of the Census
DEFENDANTS

AFFIDAVIT

STATE OF NEW JERSEY)
) SS
COUNTY OF ESSEX)

Daniel Boggan, Jr., of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am the duly appointed County Administrator of Essex County, New Jersey, and am serving on this date as Acting County Executive in the plaintiff's stead.

2. An accurate 1980 Census is essential to the welfare of the County and its residents. The County receives more than $73 million annually through a variety of federal programs that use the Census for apportioning dollars among local governments. These programs serve such essential public purposes as job training, community development, services for the aging, education, welfare and others. Census results are also used for apportioning representation in Congress and the State Legislature.

3. Any undercount of the County's population and, particularly, the poor and minority populations of the County, will mean a concomitant reduction in the Coun-

ty's ability to serve its residents and in the residents' ability to have their voice heard in the State and Federal Legislatures.

4. An undercount by the Bureau of the Census is not a mere theoretical possibility. In 1970, the Census failed to find more than 10 million people, a disproportionate number of whom lived in urbanized areas like Essex County.

5. To ameliorate the undercount problem, Essex County has developed a comprehensive list of street addresses within the County. By comparing our list with the list used by the Bureau to mail and deliver Census Forms, we will be able to locate and present to the Bureau addresses, and thus housing units and people, that the Bureau failed to find.

6. The County has made repeated attempts to obtain the Bureau's address list and has been repeatedly rebuffed. The Bureau's claim of confidentiality for this material is unsupportable. The County does not seek any information contained in the individual census reports nor any information whereby the data furnished by any particular establishment or individual can be identified. 13 U.S.C.A. ¶ 9. Moreover, the County seeks access to the Bureau's address list solely to determine its accuracy for purposes of the Census.

7. Without access to the Bureau's list of addresses, the county will have no means to determine the accuracy of the Bureau's count. It is thus absolutely essential that the county receive access to this material.

8. It is also essential that this material be received by the County at the earliest possible date. The Bureau has set aside only ten days for local government to present hard data indicating error in the Census tallies. This ten day period is the only administrative procedure available for correction of counting errors and is, as a practical matter, the most effective procedure of any kind. It is consequently imperative that the County obtain access to the Bureau's address lists and obtain

that access at a time that will allow effective participation in the local review process. We have already received data for Newark and we anticipate that the rest of the County will begin to receive its preliminary census data by August 10. Because receipt of that data triggers the start of the ten day review period, it is critically important that this matter be heard at the earliest possible date and that emergent relief be granted.

/s/ Daniel Boggan, Jr.
DANIEL BOGGAN, JR.

Sworn and subscribed to
before me this 11th day
of August, 1980.

/s/ David Ben-Asher
an attorney at law
of the State of New Jersey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No

PETER SHAPIRO, Essex County Executive
PLAINTIFF

v.

PHILIP M. KLUTZNICK, Secretary
U.S. Department of Commerce

VINCENT P. BARABBA, Director
U.S. Bureau of the Census
DEFENDANTS

AFFIDAVIT

STATE OF NEW JERSEY)
) SS
COUNTY OF ESSEX)

ROBERT WESTREICH, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the attorney responsible for the present litigation.

2. On August 1, 1980, I served a freedom of information request on James Lincoln, the FOIA officer for the Department of Commerce. The request sought release of the Census Bureau's address register for Essex County.

3. On that same date, I spoke to Paul Burke, Esq., legal adviser to the Bureau and asked for the Bureau's position on disclosure of the defendants' address lists. I was advised by Mr. Burke that it is the Bureau's firm position that the address lists are confidential. This position was subsequently confirmed in writing by Mr. Burke and that correspondence is attached as Exhibit "A" to the Complaint.

4. On August 11, I spoke to staff in the Bureau's "Correspondence" section which, I was advised, is responsible for reacting to FOIA requests. I was advised that the Bureau had not yet prepared a response to my informational request and that it was uncertain whether a response would be forthcoming before August 15.

5. On August 11, 1980, I spoke with Valerie Mauceri, Esq. of the U.S. Attorney's Office, described the nature of this litigation, and advised her that I would attempt to initiate this matter by way of an Order to Show Cause on this date, August 12, 1980.

/s/ Robert Westreich
ROBERT WESTREICH, ESQ.

Sworn and Subscribed to
before me this 12 day
of August, 1980.

/s/ Marc C. Gettis
MARC C. GETTIS
Attorney at Law of N.J.

CENSUS '80

REVISED LOCAL REVIEW PROGRAM INFORMATION BOOKLET

INTRODUCTION

The Local Review Program is one of several Census Bureau efforts specially designed to improve the completeness and accuracy of the 1980 census. Its purpose is to allow for the review of population and housing counts by local government officials before the counts become final and while census district offices are open and able to check reported discrepancies.

Local review is aimed at improving the accuracy of the census by helping to pinpoint such major problems as clusters of missed housing units, geographic misallocations resulting in housing units or group quarters being recorded in an incorrect location, or incorrectly located geographic boundaries. It is hoped that most local areas will have their own data on the number of housing units and estimates of the institutional population in the community and its sub-areas to compare with the census counts.

Therefore, the purpose of the Local Review Program remains unchanged from its original inception several years ago—to utilize and benefit from expert local knowledge to insure accurate census counts. However, as recently announced to local officials, the timing and scope of the program have changed from the original plan. This booklet, therefore, supersedes any describing the Local Review Program that were published prior to March, 1980. For an explanation of terminology used in this booklet refer to Appendix 1.

GENERAL PROGRAM CHANGES

The original Local Review Program had scheduled two review operations for mail-out/mail-back enumeration areas and one local review operation for conventionally (door-to-door) enumerated areas.[1] The revised Local Review Program will take place beginning June 1980, depending on the status of the enumeration, and will involve one review of population and housing counts. The geographic level of review has also been revised for blocked areas; all general governments below the state level will be presented with enumeration district (ED) counts for review. Block counts will not be provided for review.

Local review will occur at a late stage in the census field operations but before all field work is finished. Therefore, it should be noted that further checks of the counts are occurring concurrent with the local official review of census counts.

DECRIPTION OF LOCAL REVIEW LISTINGS AND AREAS SHOWN ON LOCAL REVIEW MAPS

Local Official Review Geographic Areas Reference List (D-416)—The Local Official Review Geographic Areas Reference List (D-416) has been provided to assist in preparation for the Local Review Program. The reference list shows all political and statistical areas for which you will be receiving census counts. Census blocks are shown within ED for reference purposes only in jurisdictions containing census blocks.

With the exception of census blocks, the presentation of political and statistical areas is identical to that which will be shown on the Local Official Review Listing (D-341). See Appendix 3, numbers 2, 3, and 4 for an explanation of the symbols and sequence shown on the reference list.

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[1] For a list of areas being enumerated conventionally, see Appendix 2.

The reference list can be used in conjunction with the local review maps to prepare and organize local data in advance of receiving the census counts. The reference list shows the manner in which the census counts will be organized.

Local Review Maps—The local review maps are also provided to assist you in preparing for participation in the Local Review Program. The maps show political and statistical areas (including census blocks where appropriate) which comprise the jurisdiction. The boundaries shown on the maps will be those on which the local review counts are based. The maps for mail census areas will show legal boundaries as of January 1, 1978. Maps for conventionally enumerated areas will show legal boundaries as of January 1, 1979. Legal boundary changes reported in the January 1, 1979 and 1980 Boundary and Annexation Survey will be shown on the 1980 census publication maps, which are currently being prepared.

Local Official Review Listing (D-341) as revised—The Local Official Review Listing (Form D-341) to be provided beginning June 1980, will present counts of population and housing units, including group quarters population, vacant housing units, and vacancy rates, for each governmental unit, and the governmental sub-areas and statistical areas, excluding census blocks, within each. In addition, where available, the 1970 total housing unit counts, the 1970-1980 percent change in housing unit counts, the 1970 total population, the 1970 population per household, and the 1970-1980 percent change in population will be shown for census tracts, places, minor civil divisions and counties. An explanation of the listing format and examples of the listings can be found in Appendix 3.

The census counts shown for local review will be based on the jurisdiction's legal boundaries as of January 1, 1978 in mail census areas, and January 1, 1979 in con-

ventionally enumerated areas. However, preliminary census counts released after the closing of the district offices (and final counts released at a later date) will reflect legal boundaries as of January 1, 1980.

QUALITY OF THE LOCAL REVIEW COUNTS

At the stage of the census operation when local review counts are produced, the population counts are not complete. In most cases, local review population counts are expected to be lower than the final counts. Further field operations mentioned previously will occur after the compilation of local review counts. In addition, counts will change due to boundary changes and annexations occurring between January 1, 1978 or 1979 and January 1, 1980. Therefore, local review counts are unofficial and are not intended to satisfy any legal purpose, such as redistricting, for which official census counts are to be used.

REVIEW TIME PERIOD

The duration of the local review period—10 working days from the receipt of the review materials—remains the same as in the original plan. However, because the local review counts will be produced and distributed at an earlier date and responses from local officials received and investigated earlier, the census district offices will have more time than they would have had under the original plan to work with local officials to resolve problems.

RESPONDING TO LOCAL REVIEW

The procedure for commenting on the local review counts and reporting significant disagreements between local estimates and the census counts remains essentially the same. The local official/liaison will notify the assigned census representative, (whose name, address and telephone number will be provided with the local review

counts) of differences to be investigated. Differences should be submitted in writing using the Local Review Response Form (D-74) to be provided. All differences must be supported by "hard evidence," which should be described in the response. (See example response in Appendix 4.) Checks of ED's will be made, as necessary, and as time and budget allow, starting with the ED's having the largest differences between the census counts and the local estimates.

Following the completion of local review and the balance of the census field operations, preliminary population and housing unit counts will be announced to the public in the form of a press release. Prior to the issuance of the press release, local officials will receive notification of the census results for their localities. These counts will be preliminary, and will reflect legal boundaries as of January 1, 1980. Counts presented in the local official notification and census press releases should reflect the results of local review efforts along with other changes brought about by the various field checks. However, it is still possible that some corrections will not be incorporated until the final counts are produced.

CRITERIA FOR LOCAL RESPONSES

Local review data should be prepared at the ED or ED/block level and areas for which counts are questioned should be pinpointed at the ED level. Responses must be formalized in writing using the Local Review Response Form (D-74) (to be provided and/or by annotating the Local Official Review Listing (D-341).

Counts questioned must be accompanied by local data. The local data must be reasonably current and be dated as of 1978, 1979, or 1980. The local data must be accompanied by a description of its source. Acceptable sources are special censuses, State and local censuses, lists of institutions and associated populations, local estimates of housing units derived from building and

demolition permits, utility connections, land use maps, aerial photography, tax assessors files, field counts of housing units or other housing unit inventories, or residential address lists.

HOW TO PREPARE LOCAL DATA FOR THE REVIEW OF ED COUNTS

Local Estimates—In preparing your local review data, please keep in mind that in general, population estimates for small areas are not an acceptable source on which to base a report of a discrepancy. Therefore, housing unit estimates are recommended for local review. In addition, local surveys taking place during the census period are discouraged as they may confuse the public and can have a negative impact on cooperation with, and response to, the Decennial Census.

Preparation for local review of ED counts is divided into 2 sections; A for jurisdictions containing no census blocks and B for jurisdictions containing census blocks. To determine if your jurisdiction contains census blocks, refer to the "Local Official Review Geographic Areas Reference List" enclosed. If no blocks are listed, refer to section A; if blocks are listed, refer to section B. For jurisdictions containing both blocked and non-blocked areas, refer to both sections.

A. Local review of ED counts for jurisdictions containing no census blocks—there has been no change in the geographic focus of the Local Review Program for these jurisdictions. Counts for all political and statistical areas recognized by the Census Bureau for local review purposes will be provided for most jurisdictions in June of 1980. These areas are shown on the Local Official Review Geographic Areas Reference List (D-416) enclosed.

   Estimates for small areas, such as locally defined blocks, can be combined to produce estimates for

ED's. The housing unit estimates for ED's can be compared to the counts to be provided. Inform the census representative of the results. If the counts agree with local estimates the census representative should be so informed. However, should the review pinpoint a specific ED where the census count is significantly different from the local estimate, or should you suspect that a new housing development or group quarters or some other such case was missed and for which you can specify the location within the ED, fill out the Local Review Response Form that will be provided. (Please refer to the example provided in Appendix 4.) If possible, provide lists of residential addresses for the ED, or area within the ED, in question. Such information will expedite our investigations.

B. Local review of ED counts for jurisdictions containing census blocks—The major change in the Local Review Program that will affect these jurisdictions is the change in the geographic level of the data appearing on the local review list. ED counts, rather than census block counts, will be provided. However, to carry out the review, it is still advisable to prepare review estimates at the block level, if possible. Block estimates may then be summed to ED's and comparisons with the counts made. For a description of how to prepare for and respond to local review of ED counts, refer to section 1 (following) if your jurisdiction has local estimates for census blocks; refer to section 2 (following) if the jurisdiction does not have available estimates for census blocks.

1. Jurisdictions having local estimates for census blocks—In advance of deceiving local review counts it is advisable to summarize estimates for census blocks to the ED level. The enclosed Local Official Review Geographic Areas Reference List

has been provided for the purpose of listing all census blocks contained within each ED. This list can be used to aggregate block estimates to ED's.

When the local review counts are received, compare local estimates to the ED counts. If counts agree with local estimates, the census representative should be so informed. However, should the review pinpoint a specific ED where the census count is significantly different from the local estimate, fill out the Local Review Response Form that will be provided. (Please refer to the example provided in appendix 4.) List not only the ED and associated local estimates, but include estimates for census blocks which make up the ED. If possible, provide lists of residential addresses for the ED or blocks within the ED. Such information will expedite our investigations.

2. Jurisdictions not having local estimates for census blocks—For jurisdictions not having review data for census blocks "on hand" an attempt to prepare such data at this time may not be feasible because of time constraints. It is therefore recommended that jurisdictions in this category follow the procedures outlined in section A.

The Census Bureau looks forward to your continued cooperation with the 1980 Census Local Review Program. If you have any questions, contact:

Chief, Decennial Census Division
Bureau of the Census
Washington, D.C. 20233

APPENDIX 1

DICTIONARY OF TERMS

Address—The unique identification of a housing unit. It includes the basic street address (see below) and any other identifiers, such as apartment or unit designations or descriptions, needed to identify a unit uniquely. Example: "11 Main St." is the basic street address.

Alaska Native Village—An entity entitled to participate in the distribution of public lands in Alaska and identified as a village in the Alaska Native Claims Settlement Act (PL. 92-203), as revised by legal actions from time to time.

Asterisk (*) and Fishhook (N)—These are symbols used on the maps.

A fishhook is a symbol used to indicate that areas across a map feature belong to the same geographic unit (usually a block). Whenever a physical feature (such as a creek, wash, brook, railroad tracks, etc.,) runs through a block on a map and the areas on both sides of the feature are included in the block, a "fishhook" is printed across the feature. Also, in some cases the block number, followed by an asterisk, is printed on each part of the block. An asterisk is also printed after a block number when parts of the block are shown on different maps.

Basic Street Address (Basic Address)—The house number and street name portion of an address (for example, "11 Main St."). The basic address for a multi-unit structure should not contain apartment or unit designations or descriptions; "11 Main St." is the basic address for all apartments at 11 Main Street. However, when a specific building is identified by a fractional number or letter, the fraction or letter should be included as a suffix to the house number (for example, "1201 Main St." or "505A Market St.").

Block—Census blocks are areas that are bounded on all sides by visible features such as streets, roads, railroad tracks, rivers, etc., or by invisible boundary features such as city or county limits. Blocks are numbered in virtually all urbanized areas, in incorporated municipalities with 100,000 or more population, and in areas that have contracted with the Bureau for block statistics.

Block number—A three-digit number that identifies a census block on a census map. Block numbers are unique within census tract/BNA.

Block Numbering Area (BNA)—An untracted area that has been block numbered, for example, municipalities of 10,000 or more population or a contract block area. All such areas carry a pseudotract number with "99" as the first two digits.

Borough—A political subdivision which is regarded by the Census Bureau as an incorporated place in Connecticut, New Jersey, and Pennsylvania. In Alaska, a borough is equivalent to a county for Census purposes (see Census Areas). In the five counties of New York City, the boroughs are non-functioning MCD's.

Boundary—A line, either physical or invisible, that defines an area of land (for example, block, enumeration district). Physical boundaries include political boundaries (for example, city limits, county lines, etc), property boundaries, street extentions, etc.

CCD (See Census County Division)

CCD Boundary—the boundary of a census county division. CCD boundaries normally follow census tract boundaries in counties which are tracted and physical features in untracted counties. In some instances, they may follow corporate limits.

CCD Code—A three-digit number, assigned by the Census Bureau, used to identify a CCD. It serves the same purpose as the MCD code.

CDP (See Census Designated Place)

Census Area (Alaska only)—A county equivalent where there is no organized borough.

Census County Division (CCD)—A subdivision of a county which is a relatively permanent statistical area, established cooperatively by the Census Bureau and local government authorities, and is used for presenting statistics in those States which do not have minor civil divisions appropriate for census purposes.

Census Designated Place (CDP)—A densely settled population center which is not incorporated as a city, village, town, etc., but which resembles a municipality in that it can be identified with a name by most people. Each census designated place has a definite nucleus of residences. The boundaries are drawn by the Census Bureau, based on local suggestions, to include, as far as possible, all the surrounding closely settled areas. These boundaries have no legal status, nor are there any officials elected to serve the traditional municipal functions. Previously known as "unincorporated place."

Census Tract—Census tracts are small areas into which Standard Metropolitan Statistical Areas (SMSA's), and some other areas outside of SMSA's have been divided for statistical purposes. Tracts are generally designed to encompass areas with some uniformity of population characteristics, economic status and living conditions. Boundaries are established cooperatively by local committees and the Bureau, with the intention that they will be retained over a long period of time so that comparisons can be made from census to census. Tracts in residential areas usually average 2,500-8,000 population.

Census Tract Boundary—The boundary of a census tract. Tract boundaries normally follow physical features and the county line but may follow political boundaries in some instances.

Census Tract Number—A one-to-four digit number, often with a two-digit suffix, used to identify a census tract. They are unique within county.

Corporate Limit—The legally defined boundary of an incorporated municipality. This boundary is subject to change through the process of locally initiated annexation, detachment and/or disincorporation.

County—The primary subdivision of a State and usually a governmental unit with powers defined by State law. Also see "County Equivalents."

County Equivalents—Independent cities in Georgia (Columbus), Virginia, Maryland (Baltimore), Missouri (St. Louis) and Nevada (Carson City), parishes in Louisiana, municipios in Puerto Rico, boroughs/census areas in Alaska—all are political geographic entities which are not counties, but are treated as such for tabulation purposes.

District Office—A temporary office opened locally for the purpose of taking the census. The area served by a District Office is generally one or more whole counties. Where counties must be divided into more than one District Office because of population size, the division is by whole census tracts.

ED (See Enumeration District)

ED Number—A unique four-digit number identifying each ED in the District Office area. If the left hand digits are zeros, the zeros may not be printed, for example, ED 0025 may be shown as "ED 25" on the census maps.

Some ED numbers may contain a letter prefix and/or suffix, for example, ED N0025, ED 0026T, and ED A0027U.

Enumeration District (ED)—A small geographic area established by the Census Bureau as a basic unit for

data collection and tabulation. An enumeration district (ED) usually represents the average workload for one enumerator during enumeration. An ED does not cross the boundaries of any other higher-level legal or satistical area, such as MCD/CCD, place, county, or tract. ED boundaries are not the same from census to census, therefore, 1970 census counts are not applicable for 1980 ED's.

Geographic allocation/misallocation—Geographic allocation is the assigning of housing units and group quarters to the proper geographic and statistical area for purposes of tabulating the census counts. Geographic misallocation occurs when enumerated housing units and/or group quarters are assigned to, and as a result tabulated in, the wrong geographic and statistical area. An example might be when the inmate population at a prison is assigned to the tract where the prison administration building is located. In reality, the residential facility is located in an adjacent census tract, and should be counted in the adjacent census tract where it is located.

Group Quarters—Any living quarters which are occupied by nine or more persons unrelated to the resident who owns or rents the living quarters or by ten or more unrelated persons. By definition, group quarters are typically found in college dormitories, fraternity houses, nurses' dormitories, halfway houses, large rooming or boarding houses, and military barracks, or institutions such as prisons, long-term care hospitals, and homes for the aged. There are two types, institutional group quarters and noninstitutional group quarters.

Household—An occupied housing unit.

Housing Unit—A housing unit is a house, apartment, a group of rooms, or a single room occupied as a separate living quarters, or if vacant, intended for occupancy as a separate living quarters.

1. "Separate living quarters" are those in which:

a. the occupant(s) live and eat separately from other person(s) in the building, and

b. the occupant(s) have direct access from the outside of the building or through a common hall (as in an apartment building, etc.).

2. If vacant, the criteria of separateness and direct access apply to the intended occupants.

3. If occupied, a tent, houseboat, lean-to, etc., may be a housing unit.

4. If a living quarters contains nine or more persons unrelated to the resident who owns or rents the quarters, or ten or more unrelated persons, it is not a housing unit, but a group quarters.

Incorporated Municipality—A political unit incorporated as a city, town (except in New England, New York, and Wisconsin), village, or borough (except in Alaska) having legally prescribed limits, powers and functions.

Indian Reservation—An area of land set aside by treaty, statute, executive order, or court decision, over which an Indian tribe exercises to some degree its civil jurisdiction.

Living Quarters—Each place where people live or could live is referred to as living quarters. There are three types of living quarters: housing units, noninstitutional group quarters, and institutional group quarters.

Minor Civil Division (MCD)—The primary political and administrative subdivision of counties; for example, townships, towns (New England, New York, Wisconsin), election districts, magisterial districts, gores, etc. In some States (for example Kansas, Maine, Michigan, New Jersey) some or all municipalities are independent of any MCD and are treated as MCD equivalents.

Place—The term "place" in Census reports refers to both legally established incorporated municipalities and to

other densely settled population centers which are not separately incorporated but are identified as census designated places.

Tract (See Census Tract)

Unclassified Housing Unit—A housing unit for which it has not been determined whether it is vacant or occupied. These are included in the total housing unit count, but are excluded when determining vacancy rate and population per household.

APPENDIX 2

AREAS BEING ENUMERATED CONVENTIONALLY

The following is a list of States or portions of States that will be enumerated conventionally in the 1980 Decennial Census. In some cases, an exception indication is the easiest way to present this information.

State	Areas (Counties, unless otherwise noted)		
Alaska	Entire State		
Arizona	Entire State except the following counties:		
	Cochise	Pima	Santa Cruz
	Maricopa	Pinal	
California	Alpine	Lassen	Plumas
	Amador	Madera	Shasta
	Calaveras	Mariposa	Sierra
	Del Norte	Mendocino	Siskiyou
	Humboldt	Modoc	Tehama
	Inyo	Mono	Trinity
	Lake	Nevada	Tuolumne
Colorado	Entire State except the following counties:		
	Adams	Douglas	Pueblo
	Arapahoe	El Paso	Teller
	Boulder	Jefferson	Weld
	Denver	Larimer	
Hawaii	Hawaii	Honolulu (part-census	
	Kauai	tracts 86.01, 91, 96.01,	
	Maui	96.02, 97, 98, 99.01,	
		99.02, 100, 101, 102.01,	
		102.02, 103.01, 114)	
Idaho	Entire State except the following counties:		
	Ada	Gooding	Payette
	Canyon	Jerome	Twin Falls
	Elmore	Minidoka	
	Gem	Owyhee	
Kansas	Barton	Hodgeman	Republic
	Cheyenne	Jewell	Rooks
	Clark	Kearney	Rush
	Cloud	Lane	Russell
	Decatur	Lincoln	Scott
	Edwards	Logan	Seward
	Ellis	Meade	Sheridan
	Ellsworth	Mitchell	Sherman
	Finney	Morton	Smith

Kansas (continued)	Ford	Ness	Stafford
	Gove	Norton	Stanton
	Graham	Osborne	Stevens
	Grant	Ottawa	Thomas
	Gray	Pawnee	Trego
	Greeley	Phillips	Wallace
	Hamilton	Rawlins	Wichita
	Haskell		
Maine	Aroostook	Lincoln	Somerset
	Hancock	Penobscot	Waldo
	Knox	Piscataquis	Washington
Massachusetts	Barnstable, Dukes, and Nantucket Counties only.		
Michigan	Alcona	Emmet	Marquette
	Alger	Gogebic	Menominee
	Alpena	Grand Traverse	Missaukee
	Antrim	Houghton	Montmorency
	Baraga	Iosco	Ogemaw
	Benzie	Iron	Ontonagon
	Chalevoix	Kalkaska	Oscoda
	Cheboygan	Keweenaw	Otsego
	Chippewa	Leelanau	Presque Isle
	Crawford	Luce	Roscommon
	Delta	Mackinac	Schoolcraft
	Dickinson		
Minnesota	Aitkin	Itasca	Norman
	Beltrami	Kittson	Pennington
	Carlton	Koochiching	Pine
	Cass	Lake	Polk
	Clearwater	Lake of the woods	Red Lake
	Cook	Mahnomen	Roseau
	Hubbard	Marshall	St. Louis (part-census tracts 102-106, 111-114, 121-141, 151-155)
Montana	Entire State except the following counties:		
	Cascade		
	Yellowstone		
Nebraska	Entire State except the following counties:		
	Burt	Gage	Saline
	Butler	Jefferson	Sarpy
	Cass	Johnson	Saunders
	Cedar	Knox	Seward
	Colfax	Lancaster	Stanton
	Cuming	Madison	Thayer

Nebraska (continued)	Dakota	Nemaha	Thurston
	Dixon	Otoe	Washington
	Dodge	Pawnee	Wayne
	Douglas	Pierce	York
	Fillmore	Richardson	
Nevada	Entire State except the following counties:		
	Clark	Storey	
	Douglas	Carson City	
	Lyon	Washoe (part-census tracts 1-30, 32)	
New Mexico	Entire State except the following counties:		
	Bernalillo	Sandoval	
	Los Alamos	Santa Fe	
North Dakota	Entire State except the following counties:		
	Cass		
	Grand Forks		
Oregon	Baker	Hood River	Sherman
	Crook	Jefferson	Umatilla
	Deschutes	Klamath	Union
	Gilliam	Lake	Wallowa
	Grant	Malheur	Wasco
	Harney	Morrow	Wheeler
South Dakota	Entire State except Minnehaha County		
Texas	Brewster	Jeff Davis	Schleicher
	Coke	Kimble	Sterling
	Crane	Loving	Sutton
	Crockett	Menard	Terrell
	Culberson	Pecos	Upton
	Edwards	Presidio	Val Verde
	Glasscock	Reagan	Ward
	Hudspeth	Reeves	Winkler
	Irion		
Utah	Entire State except the following counties:		
	Box Elder	Salt Lake	
	Cache	Summit	
	Davis	Tooele	
	Morgan	Utah	
	Rich	Weber	
Washington	Adams	Ferry	Pend Oreille
	Asotin	Garfield	Stevens
	Columbia	Lincoln	Whitman
	Douglas	Okanogan	

Wisconsin	Ashland	Forest	Polk
	Barron	Iron	Price
	Bayfield	Marinette	Rusk
	Burnett	Menominee	Sawyer
	Douglas (part-census tracts 301-303)	Oconto	Vilas
	Florence	Oneida	Washburn
Wyoming	Entire State		

APPENDIX 3

LOCAL OFFICIAL REVIEW LISTING

1. Please refer to Appendix 1, Dictionary of Terms, for the definition of the terms used below.

2. Each general government will receive a listing showing the preliminary 1980 census counts for its area and for the applicable political subareas and statistical areas. The highest elected official of a county will receive the listing showing the county total and all the political and statistical subareas as shown in Example 3A. "County Listing—Local Official Review." Similarly, the highest elected official of each functioning minor civil division and incorporated municipality will receive the listing for their area as shown in, respectively, Examples 3B, "Minor Civil Division Listing—Local Official Review," and Example 3C, "Incorporated Municipality Listing—Local Official Review," Also, the tribal chairman or principal chief of an Indian Reservation or Alaskan Native Village will receive a listing as shown in example 3D.

3. Since the census enumeration is conducted by census District Offices, the local review listings will be prepared on that basis. Although the area covered by a District Office is generally one or more whole counties, it is possible that counties, minor civil divisions or municipalities with large populations may be in more than one District Office. In these cases, the governmental unit in question will receive a separate local review listing for the area covered by each District Office. Whenever a government is in more than one District Office, the symbol ** will appear after the entity name on the listings.

4. If a legal or statistical area is split by a larger area, the notation "pt" or "p" ("part") will appear after the area name or number. For example, if a municipality is in two or more counties, "pt" will appear after the municipality name on the county listings or if a census

tract is in more than one municipality, a "p" will be appended to the census tract code on the listing for each municipality.

5. When census tracts are split by minor civil division or municipal boundaries, the total for the split tracts will appear at the end of the listing for the county. (Tracts will not be split by county boundaries.) Only the portion of the tract within the MCD or municipality will appear on those listings.

6. The 1970 housing unit and population counts will be shown for tracts, places, MCD's, and counties. Where not available at any level, "(NA)" will be shown. They are not applicable for ED's, therefore, three dots, "..." will be shown.

7. The column labelled "Local Housing Estimate" will be blank on the local review listings so that the local estimates may be entered by the person(s) doing the review.

8. The 1970 total population and housing unit counts shown in the listings may not agree with the 1970 published counts because corrections have been made to the counts. Corrections were made because of errors found and corrected or because pieces of geography have been split and rearranged due to the formation of new political entities since 1970; for example, new cities incorporating or new minor civil divisions being formed out of previously unorganized territory. When the corrections were made, they were only made to the total population count or the total housing unit count; no determination was made as to whether the corrections were part of the group quarters population or the vacant unit counts. The group quarters population and vacant housing unit counts in the listings should agree with the published counts.

9. Population per household (POP/HH) is defined as total persons in households (total population minus the group quarters population) divided by the total number of occupied housing units (total housing units minus vacant units minus unclassified units.)

10. In the 1970 POP/HH calculation, the published 1970 population and housing unit counts will be used to perform this calculation since corrections were not made to group quarters population or the vacant unit counts (as explained in item 8 above). If uncorrected group quarters population and uncorrected vacant unit counts were subtracted from corrected total population and housing counts (see item 9 above), the resulting 1970 POP/HH or vacancy rates would be misleading.

11. The vacancy rate is based on total vacant units divided by the total housing units (excluding the unclassified units). If the total number of housing units is zero, "..." will be shown. Three dots means "not applicable."

12. Percent change is calculated by subtracting the 1970 counts from the 1980 preliminary counts and then dividing by the 1970 counts. If the 1970 count is zero, "..." will be shown. If the 1980 preliminary count is higher than the 1970 count, the percent change will be shown as (9%); if the 1980 preliminary count is lower, the percent change will be shown with a minus sign (—5%).

LOCAL OFFICIAL REVIEW (Part 1)

PRELIMINARY COUNTS - SUBJECT TO CHANGE

Component Parts	HOUSING UNITS Total	Vacant	Vacancy Rate	Local Estimate	1970 Total	% Hous Change 70-80	POPULATION Total	GQ	POP/HH	1970 Total	1970 POP/HH	% POP Change 70-80
County Name	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
MCD/CCD Name	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
Place Name (if any)	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
IR/ANV Name (if any)	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
Tract/BNA XXXX.XX (if any)	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
ED XXXXX	XXXXXX	XXXXXX	XXX.X		...	...	XXXXXXX	XXXXXX	X.XX	...	...	...
ED XXXXX	XXXXXX	XXXXXX	XXX.X		...	...	XXXXXXX	XXXXXX	X.XX	...	...	...
Tract/BNA XXXX.XX	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXXXX	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
Tract/BNA XXXX.XX	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXXXX	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
Untracted or Non/BNA Area (If any)	XXXXXXX	XXXXXX	XXX.X		(NA)	(NA)	XXXXXXX	XXXXXX	X.XX	(NA)	(NA)	(NA)
IR/ANV Name	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
IR/ANV Name	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
Not in IR/ANV (if any)	XXXXXXX	XXXXXX	XXX.X		(NA)	(NA)	XXXXXXX	XXXXXX	X.XX	(NA)	(NA)	(NA)
Place Name	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
Place Name	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
Remainder of MCD/CCD (if any)	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
MCD/CCD Name	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X
MCD/CCD Name	XXXXXXX	XXXXXX	XXX.X		XXXXXXX	XXXX.X	XXXXXXX	XXXXXX	X.XX	XXXXXXX	X.XX	XXXX.X

END OF JURISDICTION

D-341 DO XXXX County Name, St

COUNTY CODE Date MM/DD/YY Time HH:MM Page XXXXX

EXAMPLE 3A — COUNTY LISTING

LOCAL OFFICIAL REVIEW (Part 2)

PRELIMINARY COUNTS - SUBJECT TO CHANGE

Component Parts	HOUSING UNITS Total	Vacant	Vacancy Rate	Local Estimate	1970 Total	% Hous Change 70-80	POPULATION Total	GQ	POP/HH	1970 Total	1970 POP/HH	% POP Change 70-80
MCD Name	xxxxxxx	xxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Incorporated Municipality Name	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
IR/ANV Name (if any)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Tract/BNA xxxx.xx (if any)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
ED xxxxx	xxxxxxx	xxxxxx	xxx.x		...	...	xxxxxxx	xxxxxx	x.xx	...	...	...
ED xxxxx	xxxxxxx	xxxxxx	xxx.x		...	...	xxxxxxx	xxxxxx	x.xx	...	...	...
Tract/BNA xxxx.xx	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
.												
Tract/BNA xxxx.xx	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Untracted or Non-BNA Area	xxxxxxx	xxxxxx	xxx.x		(NA)	(NA)	xxxxxxx	xxxxxx	x.xx	(NA)	(NA)	(NA)
IR/ANV Name (if any)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
.												
IR/ANV Name	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Not in IR/ANV (if any)	xxxxxxx	xxxxxx	xxx.x		(NA)	(NA)	xxxxxxx	xxxxxx	x.xx	(NA)	(NA)	(NA)
Incorporated Municipality Name	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
.												
Incorporated Municipality Name	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Remainder of MCD/CCD (if any)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x

END OF JURISDICTION

D-341 DO xxxx MCD Name, County Name, St COUNTY, MCD CODES Date MM/DD/YY Time HH:MM Page xxxxx

EXAMPLE 3B — MINOR CIVIL DIVISION LISTING

LOCAL OFFICIAL REVIEW (Part 3)

PRELIMINARY COUNTS - SUBJECT TO CHANGE

	HOUSING UNITS						POPULATION					
Component Parts	Total	Vacant	Vacancy Rate	Local Estimate	1970 Total	% Hous Change 70-80	Total	GQ	POP/HH	1970 Total	1970 POP/HH	% POP Change 70-80
Incorporated Municipality Name	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
County Name (total for municipality)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
MCD/CCD Name (total for municipality)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
IR/ANV Name (if any)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Tract/BNA xxxx.xx (if any)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
ED xxxxx	xxxxxxx	xxxxxx	xxx.x		...	...	xxxxxxx	xxxxxx	x.xx	...	...	...
ED xxxxx	xxxxxxx	xxxxxx	xxx.x		...	...	xxxxxxx	xxxxxx	x.xx	...	...	...
Tract/BNA xxxx.xx	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Tract/BNA xxxx.xx	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Untracted or Non-BNA Area (if any)	xxxxxxx	xxxxxx	xxx.x		(NA)	(NA)	xxxxxxx	xxxxxx	x.xx	(NA)	(NA)	(NA)
IR/ANV Name	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
IR/ANV Name	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Not in IR/ANV (if any)	xxxxxxx	xxxxxx	xxx.x		(NA)	(NA)	xxxxxxx	xxxxxx	x.xx	(NA)	(NA)	(NA)
MCD/CCD Name (total for municipality)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
MCD/CCD Name (total for municipality)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
County Name (total for municipality)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
County Name (total for municipality)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x

END OF JURISDICTION

LOCAL OFFICIAL REVIEW (Part 3)

PRELIMINARY COUNTS - SUBJECT TO CHANGE

Component Parts	HOUSING UNITS						POPULATION					
	Total	Vacant	Vacancy Rate	Local Estimate	1970 Total	% Hous Change 70-80	Total	GQ	POP/HH	1970 Total	1970 POP/HH	% POP Change 70-80
IR/ANV Name	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
County Name (total for IR/ANV)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
MCD/CCD Name (total for IR/ANV)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Incorporated Municipality	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Tract/BNA xxxx.xx (if any)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
ED xxxxx	xxxxxxx	xxxxxx	xxx.x		...	...	xxxxxxx	xxxxxx	x.xx	...	...	...
ED xxxxx	xxxxxxx	xxxxxx	xxx.x		...	...	xxxxxxx	xxxxxx	x.xx	...	...	...
Tract/BNA xxxx.xx	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Tract/BNA xxxx.xx	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Untracted or Non-BNA Area (if any)	xxxxxxx	xxxxxx	xxx.x		(NA)	(NA)	xxxxxxx	xxxxxx	x.xx	(NA)	(NA)	(NA)
Incorporated Municipality	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Incorporated Municipality	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
Remainder of MCD/CCD (if any)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
MCD/CCD Name (total for IR/ANV)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
MCD/CCD Name (total for IR/ANV)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
County Name (total for IR/ANV)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x
County Name (total for IR/ANV)	xxxxxxx	xxxxxx	xxx.x		xxxxxxx	xxxx.x	xxxxxxx	xxxxxx	x.xx	xxxxxxx	x.xx	xxxx.x

END OF JURISDICTION

D-341 DO xxxx IR/ANV Name, St

IR/ANV CODES Date MM/DD/YY Time HH:MM Page xxxxx

Page _____ of _____ pages

Form Approved: O.M.B. No. 41-S79035

FORM D-74 (3-31-80)

U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

LOCAL REVIEW PROGRAM RESPONSE

20th Decennial Census – 1980

1. Government name		
Lincolnville, Kentucky		
2. Name and title of reviewer		
J. Jones		
3. Telephone number	4. Date	5. D.O. code
(701)262-2222	June 30, 1980	

Specific area		Census count		Local estimate		Difference		Comments (include source and date of the local estimates)
Tract (if any) (a)	ED or block (b)	Housing (c)	Population (d)	Housing (e)	Population (f)	Housing (g)	Population (h)	(i)
0101	ED0208	420		505		85		Building and Demolition Permit Records as of 3/1/80 – ED0208, Block 120 contains a new housing development of 85 units.
	Block 120			142				
	121			126				
	122			84				
	123			93				
	124			145				
				Example of response from a jurisdiction having local estimates for census blocks.				
0502	ED0144	360		417		57		ED0144 contains the Lakehill Subdivision of 165 single family houses bounded by Seminary Rd., Ox Rd., Main Ave. and Hill St. ED0144 also contains the Seminary Rd. apts. of 252 units bounded by Seminary Rd., Ox Rd. and Fourth St. Source of estimates: Residential property tax files as of 1/1/80.
				Example of response from jurisdiction not having census blocks.				

FORM D-77 (APRIL 1980)

Page 16

APPENDIX 4 – EXAMPLE OF COMPLETED LOCAL REVIEW PROGRAM RESPONSE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 80-3172

CITY OF PHILADELPHIA, *et al.*, PLAINTIFFS

v.

PHILIP M. KLUTZNICK, *et al.*, DEFENDANTS

AFFIDAVIT

County of Prince Georges')
State of Maryland) ss

I, GEORGE E. HALL, being duly sworn hereby depose and say as follows:

1. I am Associate Director for Demographic Fields, U.S. Bureau of the Census, Department of Commerce, a position I have held since July 1979. In my official capacity I have the basic responsibility for the 1980 Decennial Census. In my official capacity I am familiar with the overall conduct of the 1980 Decennial Census and the various operations which comprise the census.

2. The following terms which will be used in this affidavit are defined as follows:

a. *Enumeration District (ED)* in a city is a field control area made up of whole blocks generally consisting of fewer than 325 addresses.

b. *Local Review* is a program in which the Bureau of the Census provided to the highest elected local official, counts of population and housing by enumeration district at the end of Follow-up I. The purpose was to provide the highest elected official with the opportunity to review those incomplete counts and indicate where omissions may have been made or errors made in assigning the geographic location to units already counted. Cities were

explicitly informed of the data that would be provided to them for this purpose. See Exhibit 1 attached hereto.

c. *Follow-up I.* In urban areas of the United States the 1980 Census was conducted by a "mail-out, mail-back" procedure. Registers are maintained of all addresses to which a form was mailed. If by mid-April, a form had not been returned and that fact noted in the address register, an enumerator was assigned to follow-up that address. The procedure of following up all non-mail returns was known as Follow-up I.

d. *Follow-up II.* When the questionnaires are received at the District Office (D.O.) each is reviewed for completeness and a determination whether certain persons or specific address had been missed. All such problem questionnaires as well as all "vacants and deletes" are reassigned to an enumerator to resolve problems, to determine if the vacant classification was correct, and to determine if deleted units were classified properly. This procedure is known as Follow-up II. Follow-up II also involves attempting to match names obtained from administrative records to the Census to make sure they were included.

e. *Deleted Unit.* During Follow-up I, enumerators were instructed to determine if an address included in the address register was actually a housing unit. If it was space used for non-living purposes, such as commercial or industrial building, structures which had been demolished or had not yet been completed they are "deleted" from the address registers.

3. It is my understanding that the plaintiffs in this action seek access to the following documents:

i. Master address register for the City listing the address of each dwelling enumerated in the 1980 Census;

ii. Listing of the vacant housing/dwelling units enumerated in the City in the 1980 Census;

iii. Census counts for population and housing units in the City by blocks and by block groups;

iv. Detailed breakdown of 1980 population by age, race, and sex;

v. Revised computer printout reflecting the effect of the Bureau's modifications to the preliminary population and housing counts which printout shall be presented in the same format as the original review figures.

4. The first group of documents sought by plaintiffs is the Master Address Register.* There is one address register for each enumeration district (ED). It contains not only the address for each dwelling unit in the ED, but also the surname of the householder for some occupied units (i.e., those units in multi-unit structures like apartment buildings). The address register also includes the occupancy status (occupied or vacant) and the number of persons in each occupied unit. It is my understanding these data are protected by title 13, United States Code, section 9, and may not be divulged.

5. The second group of documents sought by plaintiffs is the listing of vacant housing units.** Vacant units become known as the census proceeds particularly during follow-up I and this status is recorded in the address register. It is my understanding that such a listing would be confidential, protected by title 13, United States Code. At the end of follow-up I the number of vacancies by ED were reported to plaintiff City of Philadelphia as a part of the "local review" process. This process is described in Para. 2b above. The housing units listed as vacant (or as "delete" meaning uninhabitable) are then revisited later to verify their status.

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* An example of an address register is attached hereto as Exhibit 2.

** The form used to compile the list of vacants is attached as Exhibit 3.

6. The third group of documents sought by plaintiffs, population and housing figures by block and block groups, does not exist at this time. Such data will not be produced routinely until early 1981. In any case, it would not be possible to produce such data prior to the completion of all other work in the D.O. Special programs would have to then be written to produce the data from the computer. This would take at least three weeks beyond the closing of the last D.O. in Philadelphia.

7. The fourth group of documents sought by the plaintiffs is a "detailed breakdown of 1980 population by age, race, and sex." All of the counts discussed above are derived from the address registers. The information on age, race, and sex on the other hand are contained only on the census questionnaires. The census questionnaires are designed to be read only by electronic equipment located in our three processing offices in California, Louisiana, and Indiana. Accordingly, counts of the population by characteristics, such as age, race, and sex, cannot be made available until the 1980 census questionnaires are processed by computer. Data on age, race, and sex are scheduled to be available by July 1981. Counts by race only at the block level will be available by April 1981.

8. While it would be theoretically possible to generate a hand tally of such data should this court require it, the burden on the Bureau would be significant. The cost would be large and the time spent by the limited Census staff would distract them from their duties related to completing the Census. In any case, such data could not be produced and provided to the City until long after the last D.O. in the City had completed all of its other work.

9. The final group of documents sought by plaintiffs is a revised computer printout showing an updated version of the data presented to the plaintiff City as a part of local review. Since the initial local review counts were produced, geographic refinements have been ac-

complished. It would not be possible to reproduce in exactly the same format as they were originally provided. To attempt to do so would seriously jeopardize our ability to complete 1980 Census processing within the schedule needed to provide counts to the President by December 31, 1980, since it would require a change in the overall data base used to produce these counts for the entire country.

/s/ George E. Hall
GEORGE E. HALL

Subscribed to and sworn before me this
16th day of August 1980.

/s/ Carol Dixon Pearson
Notary Public

My Commission expires July 1, 19—.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 80-2638

PETER SHAPIRO, Essex County Executive
PLAINTIFF

vs.

PHILIP M. KLUTZNICK, Secretary
U.S. Department of Commerce

VINCENT P. BARABBA, Director
U.S. Bureau of the Census
DEFENDANTS

AFFIDAVIT

STATE OF NEW JERSEY)
) ss
COUNTY OF ESSEX)

Nick Koval, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a planner in the Division of Planning, Department of Planning & Economic Development, County of Essex. I was chiefly responsible for compiling a list of street addresses in Essex County to be used in conjunction with the Census.

2. The list was compiled from municipal and county tax records and contains, I believe, every street address in Essex County.

3. Tax records (supplemented by field inspections) were used as my source material because they are the most complete records available on street addresses in the County. Indeed, the Bureau of the Census itself recognizes the superiority of tax records and has asked the County to prepare a list of streets and address ranges from our tax records for use in a future Census.

4. Despite the Bureau's recognition of the superiority of tax records, the Bureau refuses to use our tax records to compile its address list. We offered to make our records available for that purpose in the Fall of 1979, when the Bureau was in the process of compiling its list. The offer was refused because, the Bureau said, it wanted to use a uniform system nationwide. The Bureau was, in other words, more concerned with uniformity than accuracy.

5. We intend to use the Bureau's address list solely in order to determine whether the Bureau missed addresses already known to us. We can make that determination by having a computer "read" the County's list and the Bureau's list and divulge only those addresses that do not appear on the Bureau's list.

6. I understand that other data besides street addresses is contained on the Bureau's address register. We have no interest in that other data and, under the method of computer disclosure that we proposed, all such other information would be automatically deleted and would never be accessible by us.

/s/ Nick Koval
NICK KOVAL

Sworn and subscribed to
before me this —— day
of ————, 1980.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-3172

PETER SHAPIRO, PLAINTIFFS

v.

PHILIP M. KLUTZNICK, *et al.*, DEFENDANTS

AFFIDAVIT

County of Prince George's
State of Maryland) ss

I, DONALD R. DWYER, being duly sworn hereby depose and say as follows:

1. I am a survey statistician in the Decennial Census Division, Bureau of the Census. In my official capacity, I am familiar with the overall field data collection phase of the decennial census operation.

2. It is my understanding that plaintiff in the above captioned action seeks access to the master address registers of Essex County, New Jersey

3. The Master Address Register contains not only the address for each dwelling unit in the Enumeration District (ED)*, but also the surname of the householder for some occupied units (i.e., those units in multi-unit structures such as apartment buildings). The address register also includes the occupancy status (occupied or vacant/deleted) and the number of persons in each occupied unit. It is my understanding these data are protected by 13 U.S.C. 9, and may not be divulged.

4. It is also my understanding that Essex County has developed a comprehensive list of addresses and seeks to determine whether the Bureau of the Census has failed

* An ED is an area made up of whole blocks containing, in large urbanized areas, somewhat fewer than 325 addresses. In suburban areas there are typically more than 325 addresses.

to include any of these addresses in the 1980 Census. The local review procedure as described in the attached suggests that local governments such as Essex County prepare counts of housing units (specific addresses) for small graphic areas (ED's). These counts would then be compared with the local review counts from the census. In those ED's where the city's count is significantly higher, the Census District Office will examine the addresses for that ED and recanvass/enumerate any that are missing. While it is theoretically possible to reconcile Essex county's entire disorganized list with the Bureau's address registers, the burden on the Bureau would be untenable. The cost would be large and the time spent by the limited Census staff would seriously distract them from their duties related to completing the Census.

/s/ Donald R. Dwyer
DONALD R. DWYER

Subscribed to and sworn before me
this 22 day of August 1980

/s/ Irene C. Stewart
Notary Public

My commission expires
July 1, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 80-2638

PETER SHAPIRO, *et al.*, PLAINTIFF

v.

PHILIP M. KLUTZNICK, *et al.*, DEFENDANTS

AFFIDAVIT OF WILLIAM HILL

State of New York)
County of New York) ss

I, WILLIAM HILL, being duly sworn hereby depose and say as follows:

1. I am the Director of the New York Region of the Census Bureau and have been so since January of this year. In this capacity I am responsible for the operations of the Census Bureau in New York City, Long Island, Westchester, Orange and Rockland counties and several New Jersey counties, including Essex. At its peak, the census operation in this District involved approximately 14,000 personnel. I received a Bachelor of Arts degree, with a major in economics and mathematics from New York University in 1964, and have also pursued advanced studies in statistics and demography. I have been employed by the Census Bureau since 1966, originally as a Survey Statistician and Supervisory Survey Statistician in New York, and then for two years in Headquarters as an assistant branch chief. In 1974, I became the Assistant Regional Director of the New York Region and in January of this year, I became Acting Regional Director and subsequently I became the Regional Director.

2. PURPOSE AND OVERVIEW OF LOCAL REVIEW

The Local Review Program is one of several Census Bureau (Bureau) efforts specially designed to improve the completeness and accuracy of the 1980 census. Its purpose was to allow for the review of "working level" housing unit counts by enumeration district by local government officials with expert local knowledge before those counts became final and while census district offices were open and able to check properly reported discrepancies. Local review was designed and implemented to pinpoint potential problems such as clusters of missed housing units, geographic misallocations resulting in housing units or group quarters being recorded in an incorrect location, or incorrectly located geographic boundaries. In order for the Bureau to conduct its Local Review Program effectively and within the census time schedule, it was necessary for both the Bureau and the participating units of government to follow a predetermined program plan as thoroughly described in the 1980 Census Revised Local Review Program Information Booklet which is attached to this affidavit as Exhibit 1C. The Local Review Program had two important, critical requirements which are summarized below:

a. the local review process was to be completed by a participating unit of government within a 10 working day period (as described in Exhibit 1C, page 3).

b. the reponses of governmental units to the Local Review Program were a) to be based on factual and quantifiable evidence and b) to be provided at certain geographic levels which would enable the Bureau to perform necessary investigative work in resolving any reported discrepancies (as described throughout Exhibit 1C).

These requirements will be described more fully in paragraphs 4 and 5 of this affidavit.

3. CHANGE IN PROGRAM PLANS FOR LOCAL REVIEW

The local review program was originally announced in February 1979 (see Local Review Program Information Booklet, Exhibit 1A). The program consisted of a two step local review process—precensus local review and post census local review. In March 1980, the Census Bureau announced that the Local Review Program would have to be modified (see Modification to the Local Review Program Exhibit 1B). This became necessary primarily because computer-generated address counts for precensus local review would not reflect a large number of housing units being added clerically to the master address lists just prior to Census Day. The utility of precensus local review would, therefore, be minimized since the Bureau would still be in the process of correcting and updating the listing of housing units at the very same time the governmental unit's local review effort would be pointing out deficiencies which the Bureau was already aware of and correcting prior to mailing out census forms. The modification also provided additional time (about 4 weeks) for the Bureau and local officials to resolve differences beyond the time that would have been available in the original postcensus local review time period (7-10 days). The Bureau believed that the program, as modified, was still an effective device for reviewing the census data. The 1980 Census Revised Local Review Program Information Booklet, reflecting the modifications, was sent to local officials in late April or early May 1980.

4. CENSUS BUREAU ROLE IN LOCAL REVIEW

As fully described in Exhibit 1C to this affidavit, the Census Bureau was to provide predetermined materials to the highest elected official of a local unit of government in order for that unit of government to participate in and respond to the Local Review Program. These materials, all of which were sent to Essex County on or before September 3, consisted of the following:

A. Form D-70, Local Review Program Information Booklet, which described the initial Local Review Program and which was mailed to the County in February, 1979 (see Exhibit 1A).

B. A letter to the highest elected official from the Census Bureau Director which explained certain changes to local review program and which was mailed to the County in March, 1980 (see Exhibit 1B).

C. A letter to the highest elected official from the Census Bureau Director which further explained the local review program and alerted the highest elected official that the below listed materials were being provided to the County. This letter was mailed to the County on May 3, 1980 (see Exhibit 2).

1. Form D-77, 1980 Census Revised Local Review Program Information Booklet which was mailed to the County on May 3, 1980 (see Exhibit 1C).

2. enumeration district (ED) maps which provided geographic boundary delineation of all enumeration districts (ED's) within the County and which were mailed to the County on May 3, 1980.

3. Form D-416, Local Review Graphic Areas Reference List, which was a computer printout and was to be used in conjunction with the aforementioned ED maps. These data were mailed to the County on May 3, 1980.

4. A 1980 census map legend which explained the symbolization on 1980 census maps and which was mailed to the County on May 3, 1980.

The provision of these materials to the County enabled the County to make necessary plans for the conduct of the Local Review Program while the enumeration was still in progress. The principal intent of this early delivery of informational materials was to provide the County with sufficient time to prepare its plans and approach to the Local Review Program.

D. The Local Review Program was officially scheduled to begin when governmental units received Form D-341, Local Official Review List, from the Bureau (see Exhibit 1C, pages 11-15). These materials were sent to the County on the dates shown in paragraph 6, approximately 3 months after all planning information had already been sent to the County. Form D-341, was a computer printout containing the following 1980 census local review information displayed by enumeration district

—housing unit totals

—vacant housing unit totals

—housing vacancy rate

—population totals

—group quarter population totals

—population per household totals

The receipt of Form D-341 enabled the conduct of the Local Review Program by the County as it was designed. A period of 10 working days was allowed for the City to respond to the Local Review Program once they received these data.

E. Once acceptable local review information was received from the County, the Bureau would take necessary actions, including physically recanvassing those ED's for which there was a

factual base for disagreement, to be certain that the enumeration was accurately accomplished. Corrections to the local review counts were then made as necessary.

5. ESSEX COUNTY'S ROLE IN LOCAL REVIEW

Essex County was offered the opportunity to participate in the Local Review Program. In this way the County, like other units of government throughout the country, was offered the opportunity to provide expert local knowledge accompanied by factual evidence to assure a complete census count within the County. In order for the County to participate constructively in local review as well as enable the Bureau to perform necessary analysis of the County's input during local review, the County was requested to do the following:

A. Utilize a method of comparing independent data available to the County with that provided by the Bureau to assure complete enumeration coverage. It is important to emphasize that the data utilized by the County have a factual and quantifiable base (not merely be based on intuition or more broad geographic estimates which do not enable complete analysis) in order for the Bureau to take any required corrective action and reconcile differences. Data were provided to the County at the ED level and the County was required to respond either at the ED level or at a geographic level which could clearly be converted to ED geography, such as city blocks within an ED.

B. Perform the necessary analysis of census data at the ED level and identify suspected discrepancies if and when such discrepancies were found.

C. Document, in an orderly and predetermined manner, all such discrepancies on form D-74, Local Review Program Response (see Exhibit 1C, page 16), based on the instructions contained in Exhibit 1C.

D. Provide the Bureau with the results of the County's local review of census data within 10 working days of receipt of the information contained on form D-341 (see Exhibit 1C, pages 11-15).

6. IMPLEMENTATION OF THE LOCAL REVIEW PROGRAM IN ESSEX COUNTY

A. Essex County was subdivided into two district office areas: numbered 2258 and 2212. District office 2258 includes all of Newark City. There are approximately 365 enumeration districts (ED's) in the city of Newark. An ED consists of one or more blocks which are used to administratively control census operations. Local review data for Newark City as described in subparagraph 4D above were delivered to the County and City on August 4, 1980. Local review data were mailed to the County for areas in the balance of the county on September 3, 1980. In the Local Review Program, county officials are provided with data for the county as a whole in addition to all political jurisdictions within the county.

B. The local review data, which were forwarded to the County consisted of computer printouts as described in paragraph 4D above and contained the following 1980 local review information by enumeration district:

—housing unit totals,

—vacant housing unit totals,

—housing vacancy rate,

—population totals,

—group quarter population totals, and

—population per household totals.

The computer printouts also contained 1970 final census data by tract level for housing unit and population totals, and percentage comparisons of these 1970 and 1980 figures.

C. For the material covering the City of Newark, the City's and County's responses were due by August 18, 1980, and for the balance of the county, the response was due by September 17, 1980.

7. ESSEX COUNTY PARTICIPATION IN LOCAL REVIEW

A. In response to local review data provided to the City and county, local officials submitted information described more fully below to the Bureau as part of their local review responsibilities.

B. A response was received from the Mayor of the City of Newark on August 14 which identified 10 ED's where the city believed problems existed with the census counts. That response, a letter from Mayor Kenneth Gibson of Newark is attached as Exhibit 3. Mayor Gibson commended the efforts of the Bureau during the 1980 census and indicated that except for the problems in 10 ED's, census results contained no gross omissions in housing unit coverage. The city was notified by letter, that recanvassing would be done in those 10 ED's, and except for 2 ED's, the recanvassing has been completed. As a result of the recanvassing, the Bureau added 678 persons to the count for the city. As soon as the recanvassing is completed, the city will be noti-

fied of the results of this effort. In addition, Mayor Gibson in his letter reported that four additional ED's had unusually high vacancy rates and urged the Bureau to undertake a careful review of these ED's. Field recanvassing is currently underway in those ED's.

C. In a letter to the Bureau dated August 15, Mr. Peter Shapiro, County Executive, identified five ED's where potential problems existed (see Exhibit 2A). The Bureau informed Mr. Shapiro on August 20 that we would recanvass each of the ED's. That recanvass has just been completed and as a result, the Bureau added 45 persons to the count. A formal response to Mr. Shapiro is being prepared which will provide him with the results of the recanvass.

D. The "working" level population count for the city of Newark which was provided as part of the Local Review Program was 308,960 and for the remainder of Essex County, 511,329.

E. Local review materials for the remaining jurisdictions within Essex County were mailed on September 3 and as of this date, only Bloomfield town has responded. Town officials identified 6 ED's which they believe have high vacancy rates. Each of these ED's will be recanvassed.

F. The Bureau of the Census remains fully committed to completing the review of complaints arising from the Local Review Program, providing the requirements described above are met.

8. ADDITIONAL IMPROVEMENTS IN CENSUS PROCEDURES

A. Although the Local Review Program was a major new innovation to help improve the cov-

erage of the population for the 1980 census, many additional new and expanded techniques were developed and implemented. As an example, to assure better housing unit coverage, the following procedures were implemented.

1. In areas such as Essex County, the Census Bureau procured an address list on computer tape from a commercial firm. The list was subjected to three sequential post office checks involving the update and correction by the United States Postal Service (USPS). The first of these checks is the Advance Post Office Check (APOC) which took place during the summer of 1979. The addresses on the list were printed out on cards one address to a card, and sent to the post office. Through special arrangements with the post office and using procedures prepared in cooperation with the USPS, the individual carriers checked (i.e., "case") the cards for their areas and identified any addresses they knew about for which a card has not been provided and made corrections to erroneous addresses. Upon completion of the advance post office check, these "missing addresses" and corrections were processed and added to the initial list. Later this updated computer file was used to address individual questionnaires for each housing unit. There are also a number of addresses which the Census Bureau has in its files which cannot be coded to a specific geographic location. These addresses are coded by clerks and added to the master address register in the field. The computer files are not updated to reflect these additions which appear only as handwritten entries in the

registers. The second postal check occurred early in March 1980 when the postal carriers received their addressed questionnaires and, once again, performed a check to identify any addresses for which they did not have a questionnaire. These were reported to the Census Bureau which added them only to the master address register and addressed a questionnaire for the housing unit which had been missed. On March 28, 1980, as the carriers delivered the census questionnaires, they performed the third address check. Referred to as the time-of-delivery check, they reported the address for any housing unit on the route missing a questionnaire. These were then added *only* to the master address register by the Census Bureau.

2. Early in 1980 and prior to Census Day, the Census Bureau hired and trained enumerators who performed a physical canvass of each city block and building to identify housing units which were not on the master address register. These were added to the list and questionnaires prepared. The computer file is not updated.

3. Each householder, in completing the questionnaire, was asked to report on the number of living quarters in the building. If this report differs from the master address register, it was investigated and housing units added if necessary. These additions are not reflected on the computer file.

4. Any address in the master address list for which a questionnaire was not returned by mail was visited by a census enumerator to conduct an interview. Any listing deleted

from the master address register by one enumerator was checked again by a second enumerator. The computer file is not updated.

B. Using the techniques described above, the Bureau believes that it has compiled and utilized the most complete, comprehensive, and accurate address list possible for the 1980 census. The Census Bureau did not include in this program and procedure for obtaining address lists from local jurisdictions throughout the country. Because the Bureau was utilizing a system successfully tested in the 1970 census and then further refined, the Census Bureau did not see the benefit in supplementing the list with local lists considering the inefficiencies involved. Each of the approximately 39,500 units of government would have had the opportunity to submit address lists for inclusion in the census. Working with a locally-prepared and, most likely, uniquely arranged list for each area the Census Bureau would somehow have had to develop means of standardizing each list and merging all the lists with what we already had on the computer—A task which we believe is impossible for this agency to accomplish within reasonable cost and time limits. Further, we believe that the procedures we described, including the local review effort will result in the most complete and accurate housing unit count possible in a cost-efficient manner.

9. USE OF TAX RECORDS

Although there was an offer by the county to furnish the Bureau with a list of structures obtained from tax records, such a list would not be useful because of the inherent deficiency of such lists which

usually do not include units within structure. If such a list contained units within structure, the county could have used it as a means for responding to the Local Review Program by appropriate Bureau geography.

/s/ William Hill
WILLIAM HILL

Subscribed and sworn to before me this
19 day of September, 1980.

/s/ Esli Ramón González
Notary Public

My commission expires 1982

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 80-2638

Filed April 27, 1981

PETER SHAPIRO, Essex County Executive, PLAINTIFF

v.

PHILIP M. KLUTZNICK, Secretary,
United States Department of Commerce

VINCENT P. BARABBA, Director, United States
Bureau of the Census, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that Philip M. Klutznick and Vincent P. Barabba, defendants above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the entirety of the order entered in this action on August 29, 1980.

WILLIAM W. ROBERTSON
United States Attorney

By: /s/ G. Donald Haneke
G. DONALD HANEKE
Assistant United States Attorney
Counsel for Defendants

SUPREME COURT OF THE UNITED STATES

No. 80-1436

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL., PETITIONERS,

v.

PETER SHAPIRO, Essex County Executive

ORDER ALLOWING CERTIORARI

Filed April 27, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

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No. 80-1436

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, Secretary of Commerce, and DANIEL B. LEVINE, Acting Director, Bureau of the Census,

Petitioners,

v.

PETER SHAPIRO, Essex County Executive,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Counter-Statement of Question Presented

Whether a list of street numbers in the possession of the Census Bureau is exempt from disclosure under the Freedom of Information Act, 5 USC 552.

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IN THE

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OCTOBER TERM, 1980

No. 80-1436

MALCOLM BALDRIGE, Secretary of Commerce, and DANIEL B. LEVINE, Acting Director, Bureau of the Census,

Petitioners,

v.

PETER SHAPIRO, Essex County Executive,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The order of judgment of the court of appeals (Petitioners' App. A, 1a-2a) is not reported. The oral opinion of the district court (Petitioners' App. D, 6a-13a) is not reported.

Counter-Statement of the Case

The County's goal in this litigation is to compare the Census Bureau's list of street numbers for Essex County with the County's own comprehensive record of street numbers, in order to identify deficiencies in the Bureau's data. To achieve that end, the County repeatedly offered to make its computerized address data available to the Census Bureau. (C.A.App. 41, 55). When those offers were rebuffed, and when the Bureau refused to make its address data available to the County, the respondent, Peter Shapiro, County Executive of Essex County, filed suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, to compel disclosure.

The respondent seeks access only to a list of street numbers for the county. Respondent does not ask for names of householders, the number of persons at an address, the number of housing units at an address, vacancy status, the use to which the property is put, or any other information. Because respondent seeks only a list of street numbers, and because the petitioners have not demonstrated that the disclosure of street numbers will result in the disclosure of any other information, only the confidentiality of a list of street numbers is at issue.*

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* The burden of proving that portions of a record are not "reasonably segregable", 5 USC 552(b), rests with the agency opposing disclosure—here, the petitioners. 5 USC 552(a) (4) (B); *Mead Data Cent. Inc.* v. *U.S. Department of Air Force*, 556 F2d 242, 259-262 (D.C. Cir. 1977).

The district court found that the petitioners did not demonstrate non-segregability, Petitioners' Appendix at 14a-15a; and the petitioners did not raise the issue in the court of appeals. Hence, the comments at page 10 of the Petition regarding the contents of the Bureau's master address register are irrelevant. The comments in footnote 6 of the Petition purporting to describe the work required to segregate address data are not founded on the record.

The district court flatly rejected the petitioners' claim of confidentiality. The record before the court demonstrated unequivocally that a list of street numbers would not provide any information about any particular individual or entity and that disclosure of such a list would not be a breach of confidentiality. Title 13, the district court held, does "not provide a blanket of confidentiality for any and all census materials; instead, the confidentiality requirement is structured solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response. * * * Plaintiff (respondent) does not seek access to individual reports nor does he seek access to any information that would identify the data furnished in a particular report by a particular individual". Petitioners' Appendix at 9a-10a.

The district court therefore ordered that the Bureau grant respondent access to its street number data. The court required further that the Bureau delete all other information from the relevant documents, that respondent and his agents be sworn to confidentiality pursuant to 13 USC 23(c), and that any information developed by respondent as a result of access be considered by the Bureau as though it had been timely submitted through the Local Review Program. Petitioners' Appendix at 16a-17a, 18a-19a.*

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* The Census Bureau's Local Review Program is designed to improve the statistical accuracy of the census by allowing local government participation in the counting process. Despite the Bureau's refusal to disclose its street number data, and contrary to the repeated assertions of the petitioners in their petition to this Court, the County submitted extensive data to the Bureau in connection with the Local Review Program. The County's

(Footnote continued on following page)

On appeal, the court of appeals, after argument, summarily affirmed the final judgment of the district court. Petitioners' Appendix at 1a-2a.

Reasons for Denying the Writ

This case presents the question whether the FOIA may be invoked to compel the disclosure of a list of street numbers in the possession of the Census Bureau. The courts below found that disclosure would not reveal any information about any particular individual. They found further that disclosure would promote the public good by ensuring a higher degree of accuracy for the Bureau's population estimate for Essex County. Petitioners' Appendix at 12a. They concluded that there would be no breach of the confidentiality mandated by the census laws.

Because the disclosure order at issue is consonant with the law and serves the public good, there is no reason for review of this matter by the Court. Because the district court required that respondent and his agents be sworn to confidentiality pursuant to the census laws, the question of "disclsoure" to respondent is academic. Because the decision in *Seymour* v. *Barabba,* 559 F.2d 806 (D.C. Cir. 1977), involved the disclosure of substantive information about particular establishments, it has no bearing on the instant litigation and creates no decisional conflict re-

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(Footnote continued from preceding page)

efforts, together with the efforts of municipalities located in the County, contributed to an increase of nearly 30,000 in the Bureau's population estimate for Essex County. Still at issue are another approximately 30,000 residents who, respondent says, were missed by the Census Bureau. The Bureau's present estimate of the County's population is 850,451.

quiring resolution by this Court. And finally, because this case arises under the FOIA, its resolution will have only limited significance for the 1980 census season's yield of litigation. *City of Philadelphia* v. *Baldridge*, No. 80-2785 (3d Cir); *Holland* v. *Baldridge*, No. 80-73302 (E.D.Mich); *State of New Mexico* v. *Baldridge*, No. 80-0726-C (D.N.M.); *County of Dona Ana* v. *Baldridge*, No. 80-676 (D.N.M.); *City of Hobbs* v. *Klutznick*, No. 80-792-J.B. (D.N.M. November 17, 1980); *McNichols* v. *Klutznick*, No. 80-C-1151 (D. Colo. September 17, 1980), appeal pending No. 80-2033 (10th Cir); *Carey* v. *Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. December 29, 1980), appeal pending No. 81-6042 (2d Cir). To the extent that these cases raise questions of confidentiality, they do so, counsel understands, not in the context of an FOIA request but, rather, in the course of challenges to the specific population estimates adopted by the Bureau and, for that reason, implicate a different body of law.

1. No provision of the Census Act prohibits disclosure of data like a list of street numbers. Section 8(b) of the Act, 13 U.S.C. 8(b), prohibits only the disclosure of "information reported by, or on behalf of, any particular respondent". Section 9(a), 13 U.S.C. 9(a), similarly prohibits only "publication whereby the data furnished by any particular establishment or individual under this title can be identified". 13 U.S.C. 9(a)(2). The obvious theme here is to prohibit disclosure only of data that can be identified with particular individuals and establishments.

A list of street numbers does not reveal any information about any particular individual. As the petitioner fully acknowledged below, such a list does not identify the source of a particular address, the identity of the occupants, the number of occupants, whether there are any occupants, or even whether there is a building to be occu-

pied. C.A. App. 36. Instead, a list of street numbers is simply a list of the numbers that have been assigned, by developers or by local government, to buildings and vacant lots situated along the streets within the jurisdiction of a local government. They are indistinguishable, in terms of confidentiality, from a bare list of block and lot numbers.

The petitioners suggest that disclosure of a list of street numbers would violate Sections 8(b) and 9(a) because many addresses are gathered by the Bureau "as the result of responses by indivdiuals to census inquiries." Petition at 10. Similarly, at 15-16, they suggest that the confidentiality mandate extends to any information reported by or on behalf of any respondent. If this were the touchstone for decisions under the confidentiality provisions of the census laws, then the petitioners would be forbidden to disclose essentially all the data they now publish with alacrity. The statutory test is not how the information is gathered, but what it reveals; and both statutory sections, as indicated above, condemn only those disclosures that reveal information about particular individuals.

The petitioners also suggest that disclosure of street numbers will reveal the illegal "occupancy of abandoned dwellings or the residential use of lofts zoned only for commercial purposes". Petition at 10. This contention is contrary to the petitioners' own proofs. C.A. App. 36a.* The record, as noted above, is unequivocal on this score—that a list of street numbers provides no substantive data about the use, occupancy, or existence of a structure at a particular address.

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* The referenced document makes clear that, although information with respect to use and occupancy is contained in the Bureau's records, a bare list of street numbers extracted from the Bureau's data would not, even indirectly, disclose such information.

The history of the census laws further strengthens the view, supported by common sense as well, that the provision for confidentiality is designed only to preclude the release of data that can be identified with particular individuals. As indicated above, the language of both Sections 8(b) and 9(a) focuses expressly on this concern. The predecessor to the present Section 9(a) was similarly directed against disclosures "whereby the data furnished by any particular establishment can be identified . . .". Act of July 2, 1909, ch. 2, Section 25, 36 Stat. 9. The thought is echoed in the congressional reports on the Privacy Act of 197 , 5 USC 552a (b) (4). The senate report explains that the dissemination to the Cenus Bureau of records regarding individuals is not prohibited by the Act because the Bureau's own mandate to preserve confidentiality precludes further dissemination. The report then proceeds to characterize the Bureau's mandate as "prohibit[ing] publication of data gathered by the Bureau in identifiable form . . .". S. Rep. No. 93-1183, 93rd Cong. 2d Sess. 70 (1974). Likewise, Congress' response to this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), reflects a concern only with the disclosure of information about an identifiable individual or entity. The Court's decision there held that a copy of a census report retained by the reporting establishment was not immune from judicial process. The congressional reaction to the decision, putting such documents beyond the reach of process, demonstrates not an undifferentiated opposition to disclosure of Bureau data but, rather, opposition to the disclosure of data about particular individuals or establishments. Act of October 15, 1962, Pub. L. No. 87-813, 76 Stat. 922.

The judgment below does not require the disclosure of any information about any particular individual or entity and thus preserves the full measure of confidentiality required by Congress.

2. Neither *Seymour* v. *Barabba*, 559 F2d 806 (D.C. Cir. 1977), nor any decision of this Court suggests that disclosure of a list of street numbers is prohibited by the Census Act. The district court correctly held that *Seymour* v. *Barabba* has no bearing on the case at bar. Petitioners' Appendix at 11a. In *Seymour*, the plaintiff sought not a list of street numbers but names and addresses of particular companies and substantive information about their business activities. The disclosure request was, in other words, flatly interdicted by those sections of the Act which forbid the disclosure of "information reported by, or on behalf of, any particular respondent" (Section 8(b)) and "any publication whereby the data furnished by any particular establishment or individual under this title can be identified". (Section 9(a)).

There is, then, no decisional conflict requiring resolution by this Court.

3. The district court's order fully protects the government's asserted interest in preserving confidentiality and renders the question of disclosure academic. By requiring that respondent and his agents be sworn to secrecy pursuant to the Census Act, 13 U.S.C. 23(c), the court insured that respondent would get the relief he merited and the petitioners would obtain the confidentiality they sought. After being sworn, plaintiff and his agents will be indistinguishable from the tens of thousands of other Census Bureau employees with access to data. All will be subject to severe sanctions for a breach of confidentiality. Hence, even if there were something privileged about a mere list of street numbers, disclosure to the respondent pursuant to the terms of the district court's order poses no threat of public harm and creates no need for further judicial review.

4. Finally, a decision in this case will not dispose of the confidentiality issues raised by other census litigants. Because this case arises under the FOIA it will necessarily be resolved in a procedural and substantive context distinct from essentially all other pending cases, where the confidentiality issue is presented as part of a broader challenge to the Census Bureau's methodology and product. See *City of Philadelphia* v. *Baldridge*, No. 80-2785 (3d Cir); *Holland* v. *Baldridge*, No. 80-73302 (E.D. Mich); *State of New Mexico* v. *Baldridge*, No. 80-0726-C (D.N.M.); *County of Dona Ana* v. *Baldridge*, No. 80-676 (D.N.M.); *City of Hobbs* v. *Klutznick*, No. 80-792-J.B. (D.N.M. November 17, 1980); *McNichols* v. *Klutznick*, No. 80-C-1151 (D.Colo. September 17, 1980), appeal pending No. 80-2023 (10th Cir); *Carey* v. *Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. December 29, 1980), appeal pending, No. 81-6042 (2d Cir).

Because the rules will be different in these other cases, because the case at bar does not provide the Court with an effective means for resolving the myriad issues raised by pending census litigation, and because the judgments of the district court and court of appeals are not reported and will thus have little precedential value, the Court is respectfully urged to deny the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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By: ROBERT D. WESTREICH,
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Dated: March 26, 1981

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No. 80-1436

In the Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,
AND
DANIEL B. LEVINE, ACTING DIRECTOR,
BUREAU OF THE CENSUS, PETITIONERS

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

WADE H. MCCREE, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1436

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondent acknowledges (Br. in Opp. 7) that the Census Act requires a "full measure of confidentiality" for all census data. He asserts, however, that the list of addresses compiled by the Bureau of the Census to conduct the 1980 decennial census reveals no personal information about individual respondents (*id.* at 2, 4-7). Accordingly, in respondent's view, that list is not confidential information

or data for purposes of the sweeping confidentiality provisions of the Census Act. See 13 U.S.C. 8(b) and 9(a).[1] This syllogism is both legally and factually flawed.[2]

First, disclosure of the list of addresses sought by respondent, even if it were redacted of all other information, may in fact reveal substantial personal information about individuals who have responded to Bureau inquiries. That list constitutes the Bureau's determination of all *residences* in Essex County. The Bureau compiles its list through various techniques, including postal checks, preenumeration canvassing by census personnel, and direct inquiries during the enumeration process itself. A comparison of the Bureau's list of individual residences with respondent's list of residences culled from its tax records might well disclose various untaxed or unlawful residences, including housing that Essex County considers to be abandoned or solely commercial in nature. Particularly where the Bureau learned of an unlawful residence through the voluntary cooperation of the resident under a pledge of confidentiality, the disclosure ordered by the courts below would wholly undermine the purpose of the Act's confidentiality provisions.

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[1]Respondent no longer contends that the disclosure ordered in this case is authorized by Section 9(a)(1) of the Act as publication or use of census data for the Bureau's "statistical purposes."

[2]Respondent also suggests that Essex County "repeatedly offered to make its computerized address data available to the Census Bureau" (Br. in Opp. 2). We are informed that the Bureau has no record of receiving any such offer prior to the commencement of this litigation. Moreover, the disorganized list of addresses that respondent belatedly asked the Bureau to compare with its data did not comply with the local review program guidelines and would not have been very useful since tax lists ordinarily do not specify the number of housing units in a given structure (C.A. App. 43, 55).

Moreover, even if the publication of the Bureau's list of addresses would not reveal any personal information, the courts below erroneously concluded that the Bureau must disclose its lists to respondent. The Census Act flatly bars the disclosure of any "information reported by, or on behalf of, any particular respondent" (13 U.S.C. 8(b)) or "any publication whereby the data furnished by any particular establishment or individual under this title can be identified" (13 U.S.C. 9(a)(2)). Nothing in the language of the Act suggests that only personally revealing information must be kept confidential. Rather, the broad terms of the Act, as well as the legislative history canvassed in our petition (Pet. 7-8, 12-16), make clear that any data, including a list of addresses, which relate to a particular individual or establishment, or "which might disclose information reported by, or on behalf of, any respondent" must be kept strictly confidential (S. Rep. No. 94-1256, 94th Cong., 2d Sess. 4 (1976)). Otherwise, if the courts were free to determine what kinds of individual census data were sufficiently personal to warrant protection, the Bureau would be unable to obtain the public cooperation and participation that is essential to the census process. See, *e.g.*, *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961); *McNichols* v. *Klutznick*, No. 80-2023 (10th Cir. Mar. 17, 1981), slip op. 3-4; *Seymour* v. *Barabba*, 559 F. 2d 806, 808 (D.C. Cir. 1977).

2. Respondent further argues (Br. in Opp. 8) that the decision below is not in conflict with the decision of the District of Columbia Circuit in *Seymour* v. *Barabba*, *supra*, because the plaintiff in that case sought "substantive information" as well as a list of addresses. But the *Seymour* decision neither relies on the breadth of the plaintiff's request nor indicates that the plaintiff was entitled to a list of addresses culled from other census material. To the contrary, the court of appeals held that the Census Act constitutes "a flat barrier to disclosure" of the "names and

addresses * * * utilized by the Bureau of the Census in fulfilling its duties under the federal census laws * * *." 559 F. 2d at 807-808.

Furthermore, the conclusion of the courts below regarding the confidentiality of the Bureau's address lists is squarely in conflict with the Tenth Circuit's recent decision in *McNichols* v. *Klutznick, supra*, reprinted at App., *infra*, 1a-5a. Like the district court in this case, the district court in *McNichols* both ordered the Bureau to disclose a list of addresses that it had prepared in connection with the decennial census and directed the Bureau to swear the local government's personnel to observe the confidentiality provisions of the Act in evaluating the address list. Observing that the district court's limited disclosure order "tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality" (*id.* at 3a), the court of appeals reversed. The court held that "the history of the Census Act and the broad language of the confidentiality provisions * * * make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality" (*id.* at 3a-4a). Just as the City of Denver is not entitled to discovery of the Bureau's address lists in order to challenge the accuracy of the decennial census, so too neither Essex County nor any other member of the public is entitled to public disclosure of such lists under the Freedom of Information Act, 5 U.S.C. 552.

For these reasons and the reasons stated in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

DOJ-1981-04

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIAM H. McNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

Plaintiffs-Appellees,

v.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U. S. Department of Commerce, et al.,

Defendants-Appellants.

FILED
United States Court of Appeals
Tenth Circuit
MAR 17 1981
HOWARD K. PHILLIPS
Clerk

No. 80-2023

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Case No. 80-C-1151)

Before BARRETT, DOYLE and McKAY, Circuit Judges.

McKAY, Circuit Judge.

The action underlying this properly certified interlocutory appeal is a challenge to the population count reached by the Bureau of Census for the City of Denver, Colorado. The focal point of the litigation at this stage is the plaintiffs' charge that the Bureau has "over-counted" the number of vacant housing units in Denver. The plaintiffs, asserting their interests in the census count's effect on congressional representation and in various federal grants based on census figures, sought discovery of the Bureau's list of addresses of Denver's allegedly vacant housing units. The information sought by the plaintiffs is derived from the Bureau's questionnaire program and follow-up interviews. The Bureau resisted discovery because of the express prohibitions of 13 U.S.C. § 9(a) which provides:

> 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained

> shall be immune from legal process, and shall not, without consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

Notwithstanding the express language of the statute and the "emphatically expressed intent of Congress to protect census information," *Seymour* v. *Barabba*, 559 F. 2d 806, 809 (D.C. Cir. 1977), the district court:

> ORDERED that the defendants shall produce the FARs[1] for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980 . . . .

Record, vol. 1, at 37. The court's order tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality by directing that plaintiffs' personnel who received the address lists should be sworn to the same oath of secrecy and confidentiality as required by the personnel of the Bureau of Census and by otherwise limiting any further publication of the ordered information.

There can be no question that Congress has the power to make census information gathered at its direction immune from discovery. Both the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid

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[1] FARs are "follow-up address registers" representing updated master address lists which include the Bureau's classification of housing units as either vacant or occupied.

immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality. See *Seymour* v. *Barabba*, 559 F. 2d 806 (D.C. Cir. 1977).

The plaintiffs contend, however, that their request for a list of vacant housing units should be honored. The principal thrust of the plaintiffs' argument is that the information should be released because without it they cannot meaningfully challenge the Bureau's determination of Denver population. Congress has neither made nor implied such an allowance in its prohibition and no authority is given for the notion that Congress is constitutionally required to yield to such an argument. The government has promised its citizens that census information will be kept confidential. 13 U.S.C. §§ 8(b); (c), 9(a). In exchange for and in reliance on this promise, citizens cooperate with the government's census taking efforts relatively free of inhibitions that might otherwise distort their disclosures. In these times when confidence in the government's resolve to keep its promises to its citizen is not notorious, we should not readily find excuses to abandon or prohibit the enforcement of those promises. We do not believe that in the face of the congressional prohibitions, the trial court has authority to substitute its own techniques for protecting the confidentiality mandated by the statute.

The plaintiffs also suggest several interpretations of § 9(a) that lend support to the district court's order. We do not believe that the statute permits us to conclude that the plaintiffs' intended use constitutes one of the "statistical purposes for which [the information sought] is supplied." 13 U.S.C. § 9(a)(1). Nor are we impressed that the word "publication" contained in 13 U.S.C. § 9(a)(2) should be so narrowly construed as to suggest it means only advertising the information in some press or broadcast media. The

word obviously means disclosure to anyone other than those persons authorized in the statute itself.

The plaintiffs have argued that the information sought is not within § 9(a)'s ambit because it was not "furnished" by respondents. We do not think that the word "furnished" should be so narrowly construed, particularly in light of the provisions of § 8(b) which make clear that the prohibition is against the disclosure of "information reported by" respondents. The record clearly reflects that the information ordered released was disclosed by Census respondents.[2]

No doubt the cities and counties and their residents face difficult financial problems which may be substantially affected by the uses to which census data will be put. Their remedies, if any, must lie in some device other than devices expressly prohibited by a congressional exercise of constitutional authority. The order of the district court violates the provisions of 13 U.S.C. § 9 and must therefore be reversed.

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[2]Plaintiffs have also argued that the challenge to the court's order is moot or that § 9's requirements have been waived because of some alleged breaches of the prohibitions of § 9 by Bureau employees in New Mexico. The record reveals that there is no merit to this argument.

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No. 80-1436

In the Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, SECRETARY OF COMMERCE AND DANIEL B. LEVINE, ACTING DIRECTOR, BUREAU OF THE CENSUS, PETITIONERS

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether lists of addresses collected and utilized by the Bureau of the Census in fulfilling its duties under the Census Act, 13 U.S.C. 1 *et seq.*, are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552.

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v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The oral opinion of the district court (Pet. App. 6a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on December 1, 1980. The petition for a writ of certiorari was filed on February 23, 1981, and was granted on April 27, 1981 (J.A. 72). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3), provides:

> [FOIA] does not apply to matters that are—
>
> * * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

Section 8(b) of the Census Act, 13 U.S.C. 8(b), provides in pertinent part:

> Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent * * *.

Section 9(a) of the Census Act, 13 U.S.C. 9(a), provides in pertinent part:

> Neither the Secretary [of Commerce], nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

STATEMENT

1. The Secretary of Commerce is charged by statute with conducting a decennial census of population (13 U.S.C. 141), and he has delegated this function to the Bureau of the Census (13 U.S.C. 21). In the course of carrying out its duties in connection with the 1980 decennial census, the Census Bureau compiled master address registers for each of some 300,000 enumeration districts in the country.[1] The Bureau's master address registers are maintained in the form of bound books systematically listing, *inter alia*, addresses for each dwelling unit, householders' names, number of housing units at the street address, type of census inquiry, Bureau serial number, number of persons in each unit, and, where applicable, the vacant status of the unit (J.A. 51). The list of addresses included in the master address register was compiled from commercial mailing address lists, census postal checks, pre-enumeration canvassing by census personnel, and direct responses to census questionnaires and to interviews conducted by census personnel during the census enumeration process. In some cases, the 1980 lists were also cross-checked against 1970 census data. See generally the affidavit of William Hill (J.A. 67-69).

In order to maximize the accuracy of the 1980 census, the Census Bureau developed a Local Review Program to afford local government officials an op-

[1] An "enumeration district" is a small geographical area established by the Census Bureau as a basic unit for data collection and tabulation (J.A. 33-34, 49).

portunity to review and comment on the Bureau's population and housing tabulations before those figures became final (J.A. 59-63). See the Bureau's Revised Local Review Program Information Booklet (April 1980) (J.A. 22-48). Accordingly, in August and September 1980, the Census Bureau supplied Essex County, New Jersey ("the county") and its subdivisions with the Bureau's "working figures" (J.A. 64). Under the local review program, the county had 10 working days to submit any data demonstrating inaccuracies or other problems with the Bureau's figures (J.A. 63-65).[2] Prior to its receipt of the Bureau's working figures, the county unsuccessfully sought to obtain the Bureau's list of residential addresses within the county for the alleged purpose of facilitating the county's participation in the local review program (J.A. 11-13).[3]

2. Thereafter, on August 12, 1980, respondent, the Essex County Executive, filed this suit under the Freedom of Information Act (FOIA), 5 U.S.C. 552, in the United States District Court for the District of New Jersey, seeking disclosure of the Census

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[2] The Bureau provided the county with aggregate information for each enumeration district, including the number of housing units, the number of vacant housing units, population totals and population per household totals (J.A. 64-65). The county was afforded the opportunity to analyze the census data in light of data available to the county and to identify suspected discrepancies at the enumeration district level (J.A. 27-29, 57, 63-64).

[3] The county claimed that it needed the Bureau's address list in order to determine whether the Bureau had succeeded in identifying each potential housing site in the county (J.A. 9). The Bureau denied the county's request on the ground that the census laws barred disclosure of the address list (J.A. 11).

Bureau's address list for Essex County (J.A. 1, 7-10). Respondent alleged that he intended to use these addresses to participate in the local review program and to assure the accuracy of the 1980 figures for Essex County (J.A. 9; Pet. App. 6a-8a, 10a-12a).[4] The Bureau resisted disclosure, claiming that the Census Act, specifically 13 U.S.C. 8(b) and 9(a), prohibits disclosure of all raw census data relating to particular individuals, including addresses, and that therefore the information sought by respondent was "specifically exempted from disclosure by statute" under Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).

On August 27, 1980, the district court rejected the government's claim of exemption and granted respondent's motion for summary judgment (Pet. App. 6a-13a, 16a-17a). In an oral opinion, the district court held that 13 U.S.C. 8(b) and 9(a) "d[o] not provide a blanket of confidentiality for any and all census materials; instead, the confidentiality requirement is structured solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response" (Pet. App. 9a-10a). Because respondent allegedly intended to use the census data in order to participate in the local review program, the court concluded that the address list was not confidential, at least with regard to

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[4] Shortly after the commencement of this action, respondent participated to a limited extent in the local review program (J.A. 66). On August 15, 1980, respondent sent a letter to the Census Bureau identifying five enumeration districts as to which the Bureau's data were believed to be inaccurate. After recanvassing those areas the Bureau added 45 persons to the count. Various other localities in Essex County also participated in the local review program (J.A. 65-66).

respondent. In addition, the district court observed that the address data sought by respondent are "not derived from the questionnaires received, but rather, data available prior to the commencement of the census process" (*id.* at 12a-13a).

In its judgment entered on August 29, 1980, the district court ordered petitioners to turn over the address list to respondent and his agents, but only after swearing such persons to observe the confidentiality requirements of the Census Act, in accordance with 13 U.S.C. 23(c) (Pet. App. 16a-17a). The court further directed petitioners to consider any data submitted by respondent within 10 working days of his obtaining the address lists (*id.* at 17a). Finally, the district court stayed its order pending appeal (*id.* at 18a).

On appeal, the court of appeals summarily affirmed "for the reasons stated by the district court" (Pet. App. 2a).[5]

SUMMARY OF ARGUMENT

The district court's order, summarily affirmed by the court of appeals, grants respondent's request under the Freedom of Information Act (FOIA) for disclosure of the Census Bureau's master address register for Essex County. This order is improper. The confidentiality provisions of the Census Act, 13 U.S.C. 8(b) and 9(a), constitute withholding statutes

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[5] The court of appeals agreed to stay the district court's order until December 8, 1980 (Pet. App. 2a). In the interim, the government sought a stay of the district court's order from this Court. On December 4, 1980, Justice Brennan granted a stay pending further order (No. A-490). On December 15, 1980, the Court, with two Justices dissenting, continued the stay pending the timely filing and final disposition of a petition for a writ of certiorari.

within the meaning of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), and the Bureau's address lists are subject to the prohibitions against disclosure in Sections 8(b) and 9(a). Hence, the address lists are exempt from public disclosure under the FOIA.

1. The confidentiality provisions of the Census Act, 13 U.S.C. 8(b) and 9(a), satisfy the criteria of Exemption 3 of the FOIA. Section 9(a) of the Census Act expressly prohibits the Secretary of Commerce and his agents from using census information for nonstatistical purposes, from publishing census data in a manner that could identify information furnished by a particular individual, and from permitting anyone other than sworn Census Bureau personnel to examine the individual reports. Section 8(b) of the Act authorizes the Secretary to publish aggregate statistical tabulations, but that authority is made expressly subject to the restrictions in Section 9 and to the additional limitation that the Secretary may not "disclose the information reported by, or on behalf of, any particular respondent * * *." 13 U.S.C. 8(b). As respondent has conceded, these provisions qualify as Exemption 3 statutes because they "leave no discretion" in the Census Bureau to disclose information relating to particular individuals. See *Seymour* v. *Barabba*, 559 F.2d 806, 807-808 (D.C. Cir. 1977); *McNichols* v. *Klutznick*, 644 F.2d 844, 845 (10th Cir. 1981), cert. granted, No. 80-1781 (June 15, 1981). Accordingly, the only question that remains is whether the Census Bureau records subject to respondent's FOIA request are protected from disclosure by the Census Act.

2. The language of Sections 8(b) and 9(a) of the Census Act is clear: those sections prohibit the public disclosure of all raw census data relating to indi-

vidual census respondents. Respondent does not seriously contest this point; rather, he argues that a bare list of addresses does not reveal information about any particular individual. But respondent's premise is flawed. The Bureau's address lists reveal that a particular building is used for residential purposes and disclose the number of dwelling units at each address. Thus, release of this information—which is ordinarily confirmed by census respondents during the enumeration process—could uncover the existence of housing violations and would undermine the purpose of the Act's confidentiality provisions.

The district court erred in concluding that disclosure of the address list is not barred by the Census Act because respondent intended to use the data for "statistical purposes." The release of raw census data to a person outside the Census Bureau in order to facilitate a challenge to the accuracy of the census is not one of the "statistical purposes for which [the data are] supplied," within the meaning of Section 9(a)(1). In any event, even if respondent's proposed use is a proper "statistical purpose" under Section 9(a)(1), disclosure is nevertheless barred by the other confidentiality provisions of the Act.

Furthermore, since 1879, both Congress and the executive officials responsible for conducting the census have repeatedly and uniformly expressed the view that all raw census data, including lists and schedules containing information about an individual person or establishment, must be kept strictly confidential. In 1972, for example, the Census Bureau informed Congress of its position that "addresses * * * collected under [the Census Act] * * * are * * * strictly confidential." *Sale or Distribution of Mailing Lists by Federal Agencies: Hearings on H.R. 8903*

and Related Bills Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 212 (1972). Indeed, in enacting legislation such as the Privacy Act of 1974, 5 U.S.C. 552a, Congress has acknowledged and relied on the Bureau's construction of the Census Act. In light of Congress' approval of and acquiescence in the Bureau's position, the courts below should have deferred to the agency's longstanding administrative interpretation.

Finally, important policy considerations militate against a construction of the Census Act that would permit disclosure of the Bureau's address lists. Compilation of accurate census data in a nation as vast and diverse as the United States could not be achieved without wide-spread cooperation among members of every geographical area and racial, ethnic and economic group. In order to encourage public cooperation with and voluntary participation in the census, the Bureau must provide a credible assurance of strict confidentiality with regard to all information relating to individual census respondents. Disclosure of address lists would undermine the public's confidence in the secrecy of census data and would inevitably result in a decline in the candor and cooperation that is essential to the census process.

3. The district court, in granting disclosure, focused on respondent's alleged need for the Bureau's address lists. But respondent's need for the materials is irrelevant to the determination whether they are exempt from disclosure under the FOIA and cannot justify release of exempt records. As this Court has remarked, an FOIA requester's "rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the [records] greater than that shared by the average member of the public." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975).

Respondent has in any event failed to show that disclosure is warranted, even if his particular "need" for the materials were pertinent under the FOIA. Although respondent claims that he needs the address lists to participate "meaningfully" in the Bureau's local review program, that program merely permits local governments to submit data to the Bureau; it does not authorize the Bureau to provide raw census data to local governments. Furthermore, numerous local government units, including several within Essex County, were able to participate in the program without the benefit of access to the Bureau's address lists.

In short, regardless of his asserted need, respondent has no greater right of access to the Census Bureau's raw data than has any other member of the public. The district court's unusual protective order, directing that respondent and his agents be "deputized" as sworn officers of the Bureau, merely confirms that proposition. At best, the policy issue raised by the claimed right of access to raw census data by local government officials is one that should be addressed in the first instance by Congress, not by the courts.

ARGUMENT

ADDRESS LISTS COMPILED BY THE BUREAU OF THE CENSUS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT AND THE CENSUS STATUTES

A. Introduction

Article I, Section 2 of the Constitution requires that a nationwide census of population be conducted every ten years, "in such Manner as [Congress] shall by Law direct." The basic constitutional purpose of the census is to determine the apportionment of rep-

resentatives among the states. U.S. Const. Art. I, Sec. 2; Fourteenth Amendment, Section 2. See *Carey* v. *Klutznick*, No. 81-6042 (2d Cir. June 12, 1981), slip op. 3719.[6] Beyond this rather limited constitutional role, the present census statutes (13 U.S.C. 1 *et seq.*) are concerned with a wide range of additional subjects and statistical purposes.[7] One of the major functions of census statistics today is to provide information necessary to determine state and local eligibility for federal grant-in-aid benefits that are based on population. See S. Rep. No. 94-1256, 94th Cong., 2d Sess. 1 (1976). Another important purpose of census statistics is to provide data relevant to the drafting of federal legislation. See *United States* v. *Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962), cert. denied, 371 U.S. 962 (1963); *United States* v. *Little*, 321 F. Supp. 388, 392 (D. Del. 1971); *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D.

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[6] As originally adopted, the constitutional mandate of a decennial census had a two-fold purpose. In addition to its role in the process of apportioning representatives, the census also determined the apportionment of direct taxes among the states. Since the adoption of the Sixteenth Amendment in 1913, however, income taxes may be collected "without apportionment among the several States, and without regard to any census or enumeration."

[7] Thus, 13 U.S.C. 131 requires the compilation of censuses of manufacturers, mining and other businesses every 5 years; 13 U.S.C. 141 requires the compilation of censuses on population, housing and other matters relating to population and housing every 10 years and also requires a mid-decade census; 13 U.S.C. 142 requires a census of agriculture every 5 years, and a census of irrigation and drainage every 10 years; 13 U.S.C. 161 requires a census of local governments; and 13 U.S.C. 41 and 61 require the collection and publication of statistics on cotton and oilseeds.

568, 570 (S.D.N.Y. 1958); *United States* v. *Moriarity*, 106 F. 886, 891-892 (S.D.N.Y. 1901).[8]

The Bureau of the Census obtains the underlying information upon which its statistics are based directly from individuals and establishments, as well as from other available sources, including federal agencies, local governments and private persons and agencies. 13 U.S.C. 6.[9] Although most census information obtained directly from individuals and establishments is compelled by law (13 U.S.C. 221, 223, 224),[10] compilation of accurate census data in a country as large and diverse as the United States would be impossible without wide-spread cooperation among members of every geographical area and racial, ethnic and economic group. In order to en-

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[8] In addition, statistics from census data are essential for all sorts of general and specialized studies of the social and economic development of the nation and its localities, by governments, nonprofit concerns, businesses and individuals. "Business and industry are dependent on census data for market research, plant and distributorship locations, sales opportunities, and manpower availability. Professional, trade, and voluntary organizations rely on census data to develop programs. Universities and research institutions use census data." S. Rep. No. 94-1256, *supra*, at 2.

[9] 13 U.S.C. 6(c) directs the Secretary of Commerce, to the maximum extent feasible, to obtain information from other government agencies and private sources instead of conducting direct inquiries. Congress intended that this authority to obtain information from other sources in lieu of direct inquiries be used "whenever possible in the interest of economy and reducing respondent burden." S. Rep. No. 94-1256, *supra*, at 3; H.R. Conf. Rep. No. 94-1719, 94th Cong., 2d Sess. 10 (1976).

[10] Information requested in census surveys taken more frequently than annually is not compelled. 13 U.S.C. 182, 225(c).

courage public cooperation with and voluntary participation in the census, the Census Act contains broad prohibitions against disclosure by Census Bureau personnel of census information relating to particular individuals or establishments. 13 U.S.C. 8(b), 9(a).

This case involves a Freedom of Information Act request for address lists compiled and used by the Census Bureau in conducting the census. The basic question presented is whether the Bureau's address lists are exempted from disclosure under Exemption 3 of the FOIA and the confidentiality provisions of the Census Act.[11] Because, as we show below, release of this information to the public is prohibited by statute, the judgment of the court below ordering disclosure of the address lists under the FOIA should be reversed.

B. The Census Laws Constitute Exemption 3 Statutes

The Freedom of Information Act establishes that a federal agency may not improperly withhold agency records from public disclosure. See 5 U.S.C. 552(a)(4)(B); *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980); *Forsham* v. *Harris*, 445 U.S. 169, 177 (1980); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). An agency record may be withheld, however, when the requested material falls within one or more of the nine statutory exemptions set forth in 5 U.S.C.

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[11] *McNichols* v. *Baldrige*, cert. granted, No. 80-1781 (June 15, 1981), presents the related question whether a plaintiff challenging the census figures for a particular locality is entitled to discovery of the Census Bureau's list of addresses of vacant dwelling units.

552(b). See *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 121 (1980); *FOMC* v. *Merrill*, 443 U.S. 340, 351-352 (1979). This case involves Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), which provides that an agency need not disclose matters that are "specifically exempted from disclosure by statute * * *, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

1. As respondent conceded below (Resp. C.A. Br. 10), Sections 8(b) and 9(a) of the Census Act, which govern the confidentiality of census data, unquestionably qualify as Exemption 3 statutes. This is readily apparent from the plain language of those statutes. Cf. *CPSC* v. *GTE Sylvania, Inc.*, *supra*, 447 U.S. at 122. Section 8(b) provides that, although the Secretary of Commerce may publish aggregate statistical tabulations, he may "not disclose the information reported by, or on behalf of, any particular respondent * * *." 13 U.S.C. 8(b). Section 9(a), in turn, imposes additional limitations on the use and publication of census data, specifically prohibiting the Secretary from (1) using information furnished under the Census Act for nonstatistical purposes, (2) publishing census material in a fashion that could identify the data supplied by any particular establishment or individual, and (3) permitting the inspection of census reports by persons other than the sworn personnel of the Bureau. See 13 U.S.C. 9(a).[12]

The clear intention of these provisions is that raw information furnished to the Census Bureau that re-

[12] The Census Act, 13 U.S.C. 214, imposes criminal penalties for violation of the confidentiality provisions of Section 9.

lates to individual persons or establishments is confidential, and may not be disclosed to the public, or to any federal, state or local governmental agency, except as aggregate statistical totals or subtotals. Sections 8(b) and 9(a) of the Act thus fall within category (A) of Exemption 3 because they "leave no discretion" in the Census Bureau to make public information relating to particular individuals or establishments.[13]

This conclusion is supported by the holding of every court that has addressed the issue. In *Seymour* v. *Barabba*, 559 F.2d 806 (D.C. Cir. 1977), the court of appeals focused on the language of Section 9(a)(1), prohibiting use of "the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied," and concluded that "this statute is a clear and strongly worded prohibition against disclosure which would qualify under Exemption 3. It is a flat barrier to disclosure with no exercise of discretion permitted." 559 F.2d at 807-808.[14] The Tenth Circuit similarly observed in *McNichols* v. *Klutznick*,

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[13] In addition to qualifying under Part (A) of Exemption 3, Sections 8(b) and 9(a) of the Census Act also meet the requirements of the second clause in Part (B) because they "refer[] to particular types of matters to be withheld," *i.e.*, "information reported by, or on behalf of, any particular respondent" (13 U.S.C. 8(b)), "information furnished under the provisions of this title," "data furnished by any particular establishment or individual," and "the individual [census] reports." 13 U.S.C. 9(a). However, because the statute "leaves no discretion" in the agency to disclose to "the public" under Part (A), it is not necessary to determine whether the statute would also qualify under Part (B).

[14] The court in *Seymour* also noted that the statute referred "to the particular type of matter to be withheld." 559 F.2d at 808. See note 13, *supra*.

644 F.2d 844, 845 (1981), cert. granted, No. 80-1781 (June 15, 1981), that "the broad language of the confidentiality provisions of § 9 make[s] abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentality." Accord, *Carey* v. *Klutznick*, *supra*, slip op. 3727 & n.29. See also *United States* v. *Bethlehem Steel Corp.*, *supra*, 21 F.R.D. at 569-570 ("The language of the statute [13 U.S.C. 9] is clear and unambiguous. * * * Congress created a privileged status as to information furnished to the Census Bureau and directed its confidential treatment so as to prevent misuse.").

2. The legislative history of the FOIA leaves no doubt that Congress intended Exemption 3 to preserve the confidentiality of census data. See *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808. Thus, Congress considered "[c]ensus information" (104 Cong. Rec. 6550 (1958) (remarks of Rep. Moss)) to be privileged and confidential under Section 3 of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002, which, as this Court observed in *EPA* v. *Mink*, 410 U.S. 73, 79 (1973), was the predecessor statute to the FOIA. See also S. Rep. No. 1621, 85th Cong., 2d Sess. 9 (1958); 104 Cong. Rec. 6548-6550 (1958) (remarks of Reps. Brown, Meader, and Moss); *Freedom of Information and Secrecy in Government: Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess., Pt. 2, 986, 1001 (1958).

In enacting the FOIA in 1966, Congress completely revised Section 3 of the APA. In doing so, however, Congress manifested its intent to preserve the confidentiality of census materials under Exemption 3. This intent is reflected in the following colloquy be-

tween Representative Moss, a sponsor of the bill and chairman of the committee that reported the bill to the House, and Representative Olsen (112 Cong. Rec. 13646 (1966)):

> Mr. OLSEN of Montana. * * * I do want to ask the gentleman a question with reference to the Bureau of the Census. The Bureau of the Census can only gather the information that it does gather because that information will be held confidential or the sources of information will be held to be confidential. I presume that the provisions on page 5 of the bill under "Exemptions," No. (3), in other words providing that the provisions of this bill shall not be applicable to matters that are "(3) specifically exempted from disclosure by statute;"—that would exempt the Bureau of the Census from this new provision.
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> Mr. MOSS. That is correct.

See also S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *Freedom of Information: Hearings on S. 1666 and S. 1663 (in part) Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 6 (1963).

Furthermore, in 1976, Congress amended the FOIA in light of this Court's decision in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), in order to restrict the scope of Exemption 3.[15] Government in

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[15] In *Robertson*, the Court concluded that the discretionary nondisclosure provisions of Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. 1504, constituted an Exemption 3 statute. The 1976 amendment narrowed the scope of Exemption 3 to include any nondisclosure statutes that are nondiscretionary or that specify sufficiently definite criteria

the Sunshine Act, Pub. L. No. 94-409, Section 5(b), 90 Stat. 1247. See *CPSC* v. *GTE Sylvania, Inc.*, *supra*, 447 U.S. at 121-122 n.18; H.R. Rep. No. 94-880, 94th Cong., 2d Sess., Pt. I, 22-23, and Pt. II, 14-15 (1976); H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 14 (1976). The pertinent legislative debates again reflect the congressional understanding that the Census Act's confidentiality provisions would continue to qualify as Exemption 3 statutes:

> Mr. McCLOSKEY. * * * If a statute, such as the Census Act, requires the Census Administrator to keep all information secret, it will not be subject to disclosure. * * *
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> * * * * *
>
> Ms. ABZUG. * * * I want to reassure the gentleman * * * that the question of confidentiality of the census * * * statute is protected under our present language [amending Exemption 3] * * *.
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> * * * * *
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> Mr. McCLOSKEY. * * * The Census Administrator receives information for which there is a specific requirement in the statute that it be kept secret. We never intended, when a person is required to keep information secret, that suddenly there be a requirement to make it public under the Freedom of Information Act. So if a statute requires that all census information be kept secret, we do not intend that data released under the FOI Act. * * *

122 Cong. Rec. 24211 (1976).

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for withholding certain kinds of records. As we have shown (see pages 14-16, *supra*), the Census Act establishes a nondiscretionary ban on the disclosure of all census data relating to particular individuals or establishments and hence falls within 5 U.S.C. 552(b)(3)(A).

For these reasons there can be no dispute that Sections 8(b) and 9(a) of the Census Act constitute withholding statutes under Exemption 3 of the FOIA.[16] These statutory provisions "require[] that the matters [within their scope] be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. 552(b)(3)(A). Hence, the sole remaining question is whether the Census Bureau is prohibited by the Census Act from releasing the records requested by respondent.

C. Census Bureau Address Lists Are Within The Confidentiality Mandate Of The Census Act

The language and legislative history of the Census Act make clear that census data relating to individual persons or establishments, including address lists, may not be disclosed to any person or governmental agency outside the Bureau of the Census. Any such release of Census Bureau address lists would erode public confidence in the confidentiality of census data and would thus subvert the legislative goal of securing maximum voluntary cooperation with the census.

1. In determining whether address lists fall within the confidentiality mandate of the Census Act, the starting point of analysis is the language of the statute itself. See, *e.g.*, *CBS, Inc.* v. *FCC*, No. 80-207 (July 1, 1981), slip op. 8; *American Textile Manufacturers Institute* v. *Donovan*, No. 79-1429 (June 17, 1981), slip op. 16. Section 8(b) of the Act states

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[16] In addition, as outlined below, the history of the Census Act itself shows that for more than 100 years Congress has sought to maintain the strict confidentiality of raw census data. See pages 26-29, *infra*. This history further confirms the status of Sections 8(b) and 9(a) of the Census Act as Exemption 3 statutes.

unequivocally that the Secretary may publish statistical tabulations based on the underlying census data, but may "not disclose the information reported by, or on behalf of, any particular respondent." 13 U.S.C. 8(b). And Section 9(a) confirms that the Secretary and his employees may not (1) "use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied," (2) "make any publication whereby the data furnished by any particular establishment or individual under this title can be identified," or (3) "permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports." 13 U.S.C. 9(a).[17] These sweeping provisions prohibit the disclosure of *all* raw census data relating to individual respondents, including addresses of particular respondents. In other words, under the statutory scheme, only aggregate statistical data may be disclosed to the public, and then only if such disclosure would not reveal information relating to a particular respondent or establishment.

The central thrust of respondent's argument is that disclosure of the Bureau's address lists is not barred by the Census Act because "[a] list of street numbers does not reveal any information about any particular individual" (Br. in Opp. 5). This argument falls of its own weight. Contrary to respondent's assertion, the Bureau address registers are not "simply a list of the numbers that have been assigned * * *

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[17] All Bureau employees must be sworn to observe the confidentiality provisions of the Act. See 13 U.S.C. 9, 23(c). As noted earlier (see note 12, *supra*), violation of these provisions is subject to substantial criminal penalties. See 13 U.S.C. 214.

to buildings and vacant lots situated along the streets within the jurisdiction of a local government" (Br. in Opp. 6). Rather, the address registers for each enumeration district include the addresses of all buildings in which individuals reside; the registers also contain a separate address listing for each dwelling unit within each such building. Thus, the Bureau's address registers reveal the residential status of each building listed and the number of dwelling units it contains. This is the type of information that is ordinarily confirmed by census respondents in the course of the enumeration process; if disclosed, such information could be used to the detriment of individual respondents (see page 37, *infra*).

The conclusion of the courts below that the Bureau's address lists should be disclosed under the FOIA apparently rests on Section 9(a)(1) of the Census Act. That provision states that Census Bureau personnel may not "use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied." 13 U.S.C. 9(a)(1). The district court's oral opinion, which was summarily affirmed by the court of appeals, suggests that respondent's intended use of the census data is a "statistical purpose[] for which it is supplied" (Pet. App. 8a-13a). But this conclusion ignores the prohibitions against disclosure contained elsewhere in the Act. Even if release of the Bureau's address lists would not violate Section 9(a)(1), it would run afoul of both Section 8(b), which bars disclosure of "information reported by, or on behalf of, any particular respondent," and Section 9(a)(2), which prohibits the publication of census data in a manner that could identify the in-

formation furnished by any particular establishment or individual. Nothing in the language of Section 9(a)(1) suggests that census material that is subject to the prohibitions against disclosure in other parts of the statute may be released merely because the material is to be used for "statistical purposes." Indeed, Section 9(a) is written in the disjunctive and is made expressly subject to the provisions of Section 8. Thus, even assuming that it may be a necessary condition for release of census data that a proposed recipient intends to use the data for "statistical purposes," satisfaction of that single condition is not sufficient to permit release of census data under the Act.

In any event, Section 9(a)(1) plainly limits the use of raw census data to *Bureau* personnel for the *Bureau*'s own statistical purposes, not the statistical purposes of a local governmental official or other person seeking to challenge the accuracy of the census.[18] Release outside the Bureau of raw data relating to individual respondents, for the purpose of facilitating a challenge to census statistics, is not a "statistical purpose[] for which [the data are] supplied," within the meaning of Section 9(a)(1). That section does not, in terms or by implication, authorize *any* public disclosure of raw census data, for any purpose. Section 9(a)(1) is plainly a prohibition, preventing the Census Bureau from using raw data in its possession for any purpose *other than*

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[18] See H.R. Rep. No. 960, 60th Cong., 1st Sess. 5 (1908), which equates "statistical purposes" with the Bureau's development of "statistical data," and admonishes that only the Bureau's "statistical data" may become general or public information.

the Bureau's statistical purposes, *i.e.*, developing its statistical information. That is hardly the same thing as releasing raw census data to members of the public, or to other agencies of federal, state or local government, to further their statistical purposes. Not only is such release of raw census data not authorized or contemplated by Section 9(a)(1), it is manifestly prohibited by Section 9(a)(1).

This was the effective holding of the District of Columbia Circuit in *Seymour* v. *Barabba*, *supra*, a case involving an FOIA request for disclosure of names and addresses of certain business establishments. Stressing the "emphatically expressed intent of Congress to protect census information" (559 F.2d at 809), the court held that "names and addresses of reporting firms * * * [are] protected under Section 9(a)(1)" (*id.* at 808-809). In reaching this result, the court held that the Secretary's authority to release "statistical" materials under the Census Act is strictly limited by Section 8(b) (*id.* at 809):

> We think the authority of the Secretary * * * to disclose is an authority to disclose numerical statistical data which does not identify any person, corporation, or entity in any way. Totals, perhaps subtotals and divisions by categories, but nevertheless merely numerical figures are within this meaning. Individual names and addresses are not.

Likewise, in *McNichols* v. *Klutznick*, *supra*, local government officials who brought an action challenging the census count for Denver, Colorado, sought discovery of the Census Bureau's list of addresses of allegedly vacant housing units in that city. In rejecting the discovery request, the court of appeals stated: "[W]e do not believe that the statute per-

mits us to conclude that the plaintiffs' intended use constitutes one of the 'statistical purposes for which [the information sought] is supplied.' 13 U.S.C. § 9(a)(1)." 644 F.2d at 846.

Moreover, as we have already pointed out (see pages 21-22, *supra*), any use of census data not prohibited by Section 9(a)(1) is expressly subject to the other prohibitions against disclosure in Section 9(a) and to the flat ban set forth in Section 8(b) regarding the disclosure of any "information reported by, or on behalf of, any particular respondent" to the census. See 13 U.S.C. 9(a) ("except as provided in section 8 of this title"). In ordering release of the address lists, the district court apparently concluded (Pet. App. 12a-13a) that the information sought by respondent is not protected by these sections of the Census Act because the information allegedly was received "prior to the commencement of the census process" and was not "derived from the questionnaires" that were filled out and returned to the Census Bureau by particular respondents. This argument is both legally and factually flawed. To begin with, there is nothing in the language of the Census Act that supports the district court's conclusion that only information obtained in the course of the enumeration process and in response to questionnaires is subject to the confidentiality provisions of the Act. In addition, the district court's holding ignores the fact that the Census Bureau compiles its address registers from a variety of sources, including postal checks, pre-enumeration canvassing by census personnel, and direct inquiries during the enumeration process itself. Even where information concerning particular addresses is initially obtained from sources other than individual respondents, in most cases that information is confirmed by the respon-

dents in their census returns. Accordingly, the master address registers ordered to be disclosed by the district court in fact reflect information "reported by" individual respondents.

Furthermore, and perhaps most important, the release of addresses by the Census Bureau cannot be squared with the unequivocal intent of Congress to assure the public that raw census data will be kept strictly confidential, regardless whether the information was supplied by "sources other than the specific [respondents]." *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808. Section 6(c) of the Act directs the Secretary, to the maximum extent possible, to obtain information from other federal agencies, local governmental entities and private sources, instead of conducting direct inquiries. 13 U.S.C. 6(c). The Census Act defines "respondent" as any corporation, individual, or other organization or entity which "reported" information, "*or on behalf of which information was reported*," in response to a questionnaire, inquiry, or other request of the Bureau. 13 U.S.C. 1(3) (emphasis added). Section 8(b), in turn, permits the release of only those statistical materials "which do not disclose the information reported by, *or on behalf of*, any particular respondent * * *." 13 U.S.C. 8(b) (emphasis added). By expressly applying the confidentiality mandate not only to information "reported by" respondents, but also to information reported "on behalf of" respondents, Congress clearly expressed its desire to protect *all* raw census data pertaining to individual census respondents.

2. The legislative history of the Census Act confirms that the master address registers and any other census information pertaining to individual persons or establishments are not subject to disclosure. The initial census statutes required the public posting of

the actual census schedule of results in each district. See Act of Mar. 1, 1790, ch. 2, Section 7, 1 Stat. 103; Act of Feb. 28, 1800, ch. 12, Section 7, 2 Stat. 13; Act of Mar. 26, 1810, ch. 17, Section 7, 2 Stat. 567-568; Act of Mar. 14, 1820, ch. 24, Section 7, 3 Stat. 552. Subsequently, however, Congress reacted to the public's apparent concern over the general disclosure of census data (see, *e.g.*, S. Misc. Doc. No. 41, 41st Cong., 2d Sess. (1870)), and, in 1879, it directed each enumerator to take an oath "not [to] disclose *any information* contained in the *schedules, lists*, or statements" used in the decennial census. Act of Mar. 3, 1879, ch. 195, Section 7, 20 Stat. 475 (emphasis added). See, *e.g.*, Act of Mar. 1, 1889, ch. 319, Section 8, 25 Stat. 763; Act of Mar. 3, 1899, ch. 419, Sections 7, 18, and 21, 30 Stat. 1015, 1019, 1020.

Since 1879, Congress has repeatedly expressed the view that *all* raw census data, including lists and schedules containing any information about an individual person or establishment, must be kept strictly confidential. Thus, Section 25 of the Act of July 2, 1909, ch. 2, 36 Stat. 9, the predecessor to Section 9(a) of the current Act, provided that "[n]o publication shall be made by the Census Office whereby the data furnished by any particular establishment can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports." And the House Report accompanying the 1909 version of the Census Act reflected with clarity Congress' understanding that complete confidentiality of "all schedules and other information officially obtained" was essential to the vitality and efficacy of the census. H.R. Rep. No. 960, 60th Cong., 1st Sess. 5 (1908). See also, *e.g.*, *id.* at 23.

In revising and amending the census laws on several occasions since 1909, Congress has continued to preserve and to strengthen the appearance and fact of confidentiality that is essential to the census process. See, *e.g.*, Act of Apr. 2, 1924, ch. 80, Section 3, 43 Stat. 31; Act of June 18, 1929, ch. 28, Sections 8 and 21, 46 Stat. 23, 26; Act of July 25, 1947, ch. 331, Section 3, 61 Stat. 458; Act of Aug. 31, 1954, ch. 1158, 68 Stat. 1013-1014; S. Rep. No. 2497, 83d Cong., 2d Sess. 2, 10 (1954); H.R. Rep. No. 1980, 83d Cong., 2d Sess. 10 (1954). In 1962, for example, Congress promptly overruled this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), which had held that a copy of a census report retained by a business establishment was not immune from judicial process. See Act of Oct. 15, 1952, Pub. L. No. 87-813, 76 Stat. 922. The pertinent Senate Report observed that the amendment was necessary "to clarify[] the intent of the Census Act in order to provide the protection of confidentiality" that is "vital to its effectiveness." S. Rep. No. 2218, 87th Cong., 2d Sess. 2, 4 (1962).[19]

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[19] Respondent argues (Br. in Opp. 7) that the amendment overruling the decision in *St. Regis* was a narrow one, limited to ensuring the confidentiality of copies of census reports retained by the reporting establishment. See also *Carey* v. *Klutznick*, *supra*, slip op. 3731-3733 (Stewart, J., concurring). But the holding of *St. Regis* was itself extremely narrow. The *St. Regis* decision did not question the statutory obligation of Census Bureau personnel to preserve the confidentiality of census information. Indeed, the Court emphasized that Congress had restricted the use of census information "while in the hands of those persons receiving them, *i.e.*, the government officials." 368 U.S. at 218. See also *id.* at 217 ("the prohibitions against disclosure contained

The history of the 1976 amendment to the Census Act further refutes respondent's contention that the Bureau's master address registers are not covered by

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in § 9 run * * * against the officials receiving such information * * *."). Despite its narrow holding, the decision in *St. Regis* had "an extremely adverse effect on the Bureau's ability to gather complete and accurate data." *Heathman* v. *United States District Court*, 503 F.2d 1032, 1036 (9th Cir. 1974) (Chambers, J., concurring). This is confirmed by a letter from the Secretary of Commerce to Congress urging that legislation be adopted overruling *St. Regis*. In his letter, the Secretary stated:

> Because of that ruling it is imperative that corrective legislation be enacted to extend the confidentiality of Section 9 to the copies of Census reports retained by respondents. The decision had an extremely adverse effect on Bureau operations, as not only did some companies destroy their file copies, and thus sever reporting continuity, but many companies lost faith in the promises of the Bureau, and the response to surveys has deteriorated. The lack of file copies increases the cost of obtaining statistical information. The lack of confidence and cooperation will reduce the number of voluntary reports and correspondingly will reduce the accuracy of the statistics.
>
> * * * * *
>
> The *St. Regis* decision impaired the working relationship between the Census Bureau and its respondents. Although the confidentiality of the Census Bureau's own files was affirmed, it is also true that respondents had previously been led to believe by the Government that retained copies enjoyed this same confidentiality. Moreover, the decision has interposed an impediment in the statistics-gathering process because respondents who wish to preserve confidentiality must now destroy their file copies of questionnaires. Some now express reluctance to cooperate further in statistical inquiries.

S. Rep. No. 2218, *supra*, at 3, 4.

the confidentiality provisions of the Act. At that time, Congress amended Section 8 "to add further protection of privacy." S. Rep. No. 94-1256, 94th Cong., 2d Sess. 3 (1976). See Act of Oct. 17, 1976, Pub. L. No. 94-521, Section 6, 90 Stat. 2460. The Senate Report explains that Section 8, as amended, "ensures that the authority of the Secretary of Commerce to furnish statistical tabulations or other material to *public* and private *entities* does not extend to any material which *might* disclose information reported by, or on behalf of, any respondent." S. Rep. No. 94-1256, *supra*, at 4 (emphasis added). See H.R. Conf. Rep. No. 94-1719, 94th Cong., 2d Sess. 10-11 (1976). Congress thus did not intend to give public entities such as Essex County any greater right of access to census data than that of any other member of the public.[20] In addition, it is apparent that the master address registers constitute census "material which might disclose information reported by, or on behalf of," individual respondents (see pages 24-25, *supra*). In sum, the legislative history of the Census Act demonstrates that Congress intended to preserve the confidentiality of all raw census data.

3. Even if these affirmative expressions of congressional intent were not so clear, there is additional evidence that the Census Act prohibits the disclosure of raw census information, including address lists. For more than 70 years, officials of the Executive Branch responsible for conducting the census have consistently taken the position before Congress that the confidentiality mandate of the census laws

[20] Indeed, not even other federal agencies, including the FBI, have access to census data such as the master address registers. See H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 12-13 (1974); 36 Op. Att'y Gen. 362 (1930).

applies to such information, and the legislative record strongly supports the conclusion that Congress has fully concurred in this position. In these circumstances, the courts below should have deferred to the longstanding administrative interpretation of the statute by the agency charged with its execution. See, *e.g.*, *CBS, Inc.* v. *FCC*, *supra*, slip op. 12-15; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

In 1908, Congress acknowledged that "[i]t is the policy of the Census Office to consider all schedules and other information officially obtained as for use exclusively for statistical purposes, and information is given in the confidence that that policy will be observed. The office is not a general information bureau, excepting for purely statistical data." H.R. Rep. No. 960, *supra*, at 5.[21] More recently, in the

[21] The view that raw census data may not be disclosed by Census Bureau officials was reinforced in 1930 by an opinion of the Attorney General in connection with a request that the Census Bureau furnish the Women's Bureau of the Department of Labor "with the names, addresses, occupations, and status of employment" of workers in Rochester, New York. 36 Op. Att'y Gen. 362 (1930). The Attorney General noted that it had been the practice of the Census Bureau "to interpret the law most strictly against furnishing either official or private persons with information that would reveal to another the identity of the individuals to whom it relates." *Id.* at 365. He further pointed out that the Bureau had adhered to its confidentiality mandate to such an extent that "even statistics for a given community are not published when, because of the limited number of industries therein, the possibility exists that interested parties by some computation might succeed in disclosing information respecting a particular establishment or establishments." *Ibid.* In concluding that the Census Bureau need not disclose the names and addresses (and other information pertaining to) workers in

course of legislative hearings that eventually led to adoption of the Privacy Act of 1974, 5 U.S.C. 552a, the Census Bureau specifically informed Congress of its position that individual "names and addresses * * * collected under title 13, United States Code, * * * are * * * strictly confidential." *Sale or Distribution of Mailing Lists by Federal Agencies: Hearings on H.R. 8903 and Related Bills Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 212 (1972). See also *id.* at 38, 213. There is no indication in the legislative history of the Privacy Act that Congress did not accept that view.[22] On the contrary, all available evidence strongly suggests that Congress was in agreement with the Bureau's position.

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the Rochester area, the Attorney General quoted at length from the proclamation of President Hoover after enactment of the then most recent amendment to the census laws (*id.* at 366, quoting from 46 Stat. 3012):

> "The sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration or with the enforcement of any national, state or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. For the due protection of the rights and interests of the persons furnishing information every employee of the Census Bureau is prohibited, under heavy penalty, from disclosing any information which may thus come to his knowledge."

[22] The 1972 hearings are referred to in the legislative history of the Privacy Act. 120 Cong. Rec. 40884 (1974).

Thus, in enacting the Privacy Act, Congress was sufficiently impressed with the general confidentiality mandate already applicable to census information that it exempted "from virtually all requirements of the [Privacy Act]" [23] any system of records "required by statute to be maintained and used solely as statistical records." 5 U.S.C. 552a(k)(4).[24] This exemption, relating primarily to census records, was considered to be justified because of the "very specific procedures and rigorous safeguards applied to them." S. Rep. No. 93-1183, 93d Cong., 2d Sess. 77 (1974).

A similar rationale explains why Congress excepted from the consent requirements of the Privacy Act, 5 U.S.C. 552a(b)(4), the transfer of individual information from other federal agencies to the Census Bureau. The Senate Report explains that such transfers do not interfere with individual privacy because the census "laws prohibit publication of data gathered by the Bureau in identifiable form and strictly govern confidentiality." S. Rep. No. 93-1183, *supra*, at 70. See, *e.g.*, *id.* at 5, 12. The House Report similarly states that "[l]aws relating to the Bureau of the Census are very strict, limiting access to such records only to Census employees * * *."

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[23] H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 20 (1974). See 45 Fed. Reg. 82125-82126 (1980).

[24] A statistical record is defined in the Privacy Act as "a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13[.]" 5 U.S.C. 552a(a)(6). As the House Report explained, the latter provision "permits the Census Bureau to furnish transcripts of census records for genealogical and other proper purposes * * *." H.R. Rep. No. 93-1416, *supra*, at 12. See 13 U.S.C. 8(a).

H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 12 (1974). See, *e.g.*, *id.* at 3, 13, 25. See also *Hearings on H.R. 8903*, *supra*, at 38, 62-63; *Special Inquiry on Invasion of Privacy: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess., Pt. 1, 276, 283, 284-286 (1965). Particularly in view of the administrative interpretation mentioned above, there is nothing in the legislative history of the Privacy Act to suggest that, in making these unequivocal statements, the congressional committees were not referring to *all* information collected by the Census Bureau under the Census Act, including individual addresses.

4. The discussion above demonstrates that Congress intended the confidentiality provisions of the Census Act to be construed so as to protect all raw census data relating to individual respondents. We have also shown that the Bureau's address lists reveal information relating to particular respondents (*e.g.*, the residential status of each building listed and the number of dwelling units in each building). Because release of the Bureau's address lists might uncover instances of illegal occupancy or other violations (see page 37, *infra*), the disclosure ordered by the courts below would wholly undermine the purpose of the Act's confidentiality provisions.

More general policy considerations also militate against a construction of the Census Act that would permit disclosure of the Bureau's master address registers. This Court has recognized that strict confidentiality of census data is essential to ensure public cooperation with and voluntary participation in the census. *St. Regis Paper Co.* v. *United States*,

supra, 368 U.S. at 218. As the court of appeals observed in *McNichols* v. *Klutznick*, *supra*, 644 F.2d at 845, "[t]he government has promised its citizens that census information will be kept confidential. * * * In exchange for and in reliance on this promise, citizens cooperate with the government's census taking efforts relatively free of inhibitions that might otherwise distort their disclosures." See also *LaMorte* v. *Mansfield*, 438 F.2d 448, 452 (2d Cir. 1971) ("[E]ffective operation of the census requires a maximum of voluntary cooperation. In order to promote this, assurances of confidentiality * * * [have] been given * * *.").[25]

Thus, although the protection of personal privacy is an important concern of the confidentiality provi-

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[25] And see *FTC* v. *Dilger*, 276 F.2d 739, 742 (7th Cir.), cert. denied, 364 U.S. 882 (1960) ("Congress sought to encourage the cooperation of individuals and businesses in furnishing requested information and to that end gave unreserved assurances that no harm would result from compliance; that there need be no fear that disclosures would be made; and that for the protection of the rights and interests of persons furnishing information, severe criminal penalties would be invoked."); *United States* v. *Bethlehem Steel Corp.*, *supra*, 21 F.R.D. at 570 ("[W]hen Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the Government, another purpose was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests."); H.R. Rep. No. 960, *supra*, at 5 ("Protection against promiscuous or general publicity is of vital importance in securing complete and accurate statements * * *.").

sions of the Census Act,[26] unlike other statutes—such as the Privacy Act and Exemption 6 of the FOIA [27]—which are also concerned with preserving individual privacy, *more* than individual privacy interests underlie the prohibition against disclosure of raw census data. Indeed, much information about individuals collected by the Census Bureau is not inherently "private" at all, but is either well known or is readily accessible to other persons through observation or examination of publicly available records (*e.g.*, an individual's name, place of employment, sex, age, address, type of dwelling, members of family, etc.). Cf. *United States* v. *Dionisio*, 410 U.S. 1, 14 (1973). Yet none of this information may be disclosed by the Bureau of the Census, because the Bureau must provide a credible public assurance that it maintains *all* information relating to individuals on a strictly confidential basis, without exception, and that such information will be released, if at all, only as aggregate statistics.

Privacy interests *per se* have never been held to the same strictness. Privacy interests may be weighed and balanced against other interests, such as the public's need to know, on a case-by-case basis.[28] However, the interest in maintaining public confidence in the secrecy of raw census data cannot be compromised by or balanced against other asserted

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[26] See S. Rep. No. 94-1256, *supra*, at 3-4.

[27] Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), provides that the FOIA does not apply to matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

[28] See, *e.g.*, *Department of the Air Force* v. *Rose*, 425 U.S. 352, 373 (1976).

interests if the former is to be credibly maintained.[29] Once breached, such confidence may never be recovered. Cf. *Upjohn Co.* v. *United States*, No. 79-886 (Jan. 13, 1981), slip op. 8. Hence, the statutory mandate of confidentiality necessarily encompasses all raw data relating to individual census respondents, including addresses, whether or not such information would qualify for protection under other statutes that are concerned solely with personal privacy.

As respondent has acknowledged (Br. in Opp. 2; Mem. in Opp. to the App. for a Stay at 3 n.*), the Census Bureau's master address registers for Essex County, which the district court ordered disclosed, contain substantial information of a personal nature regarding individual census respondents, including names, number of housing units and persons per household at each address, the vacant or occupied status of each unit, and the manner in which the census information was obtained for a particular address (J.A. 51). See page 3, *supra*. Even if the address registers could readily be redacted to

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[29] The public interest asserted by respondent is the interest in a verifiably accurate census count. But, as the Tenth Circuit concluded in rejecting a similar argument in *McNichols* v. *Klutznick*, *supra*, 644 F.2d at 845, the initiation of a public challenge to the Bureau's census count cannot be a sufficient basis to warrant a breach in the strict confidentiality mandated by the Census Act. While disclosure in this context might have the short term benefit of assuring a more accurate count in the 1980 decennial census in Essex County, the long term effect would be to reduce the accuracy of future censuses by deterring numerous individuals from cooperating in the census process.

produce a bare list of addresses,[30] disclosure of that list would be contrary to both the letter and the spirit of Sections 8(b) and 9(a). Many addresses are added to the address registers solely as the result of responses by individuals to census inquiries, and the individual responses serve to confirm the accuracy of addresses obtained from other sources. In addition, publication of a list of addresses might reveal various unlawful or untaxed dwellings, *e.g.*, the occupancy of "abandoned" dwellings or the residential use of lofts zoned only for commercial purposes. Accordingly, disclosure of such information, particularly to the local government, would inevitably result in a decline in the candor and cooperation so essential to the census process.[31]

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[30] The record shows that numerous addresses added to the master address registers prior to and during the 1980 census were not recorded in the Census Bureau's computer files (J.A. 67-69). We have been informed by the Census Bureau that a list of addresses could be culled from the master address registers for Essex County only by copying the thousands of pages constituting the master address registers and by manually redacting the substantial amount of information found over much of each page of the registers.

[31] District Judge Stewart, concurring in *Carey* v. *Klutznick*, *supra*, disputed the majority's interpretation of Sections 8(b) and 9(a) as covering all information or data related to any particular respondent. In concluding that a broad reading of these sections was unnecessary to provide protection to census respondents, Judge Stewart relied on Section 8(c) of the Act, 13 U.S.C. 8(c), which states that information furnished by the Census Bureau under Section 8 may not "be used to the detriment of any respondent or other person to whom the information relates * * *" (see slip op. 3733). This prohibition applies only to disclosures made by the Bureau pursuant to Sections 8(a) and (b) and would not appear to cover releases, as in this case, pursuant to the FOIA. But even if Section 8(c) were construed to include the instant situation, the possi-

The language and legislative history of the Census Act, the histories of the FOIA and Privacy Act, the agency's longstanding administrative interpretation and important policy considerations all persuasively demonstrate that the Census Bureau's lists of addresses—like other information relating to individual respondents that is furnished to the Bureau in the course of taking the census—are within the confidentiality mandate of Sections 8(b) and 9(a) of the Census Act and are therefore specifically exempted from disclosure under Exemption 3 of the FOIA. The FOIA therefore "does not apply" to Census Bureau address lists. 5 U.S.C. 552(b).

D. Respondent's Claimed Right of Access Under The FOIA To Raw Census Data Is "Neither Increased Nor Decreased" By Reason Of His Interest In Challenging The Census Count For Essex County

In ordering disclosure of the Census Bureau's address lists under the FOIA, the district court emphasized respondent's alleged need for the materials to facilitate the participation of Essex County in the Bureau's local review program (see Pet. App. 7a, 10a-12a). But, as respondent himself conceded in the court of appeals (Resp. C.A. Br. 4), respondent's need is irrelevant and cannot justify disclosure of exempt records under the FOIA.[32]

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bility that a respondent might face the burden of proving that information used against him was tainted undoubtedly would discourage the voluntary release of information to the Census Bureau.

[32] Respondent argued below only that the Bureau's address lists do not come within the confidentiality protections of the Census Act. We have already shown that this argument is without merit.

1. The Freedom of Information Act applies only to agency records that are not exempted from the Act. The FOIA "does not apply" to matters that are exempted under any of the nine exemptions. 5 U.S.C. 552(b). A particular matter or record is either exempted or it is not. If a record is not exempted it may not be "improperly withheld" from "any person" who has requested it. 5 U.S.C. 552(a)(3). If a record is exempted, no person has any right to it under the FOIA. A particular matter or record cannot be both exempted and nonexempted, depending on who the requester is or what his needs or purposes are. The legislative history of the FOIA clearly indicates that the statute is exclusively concerned with access by "the public as a whole" to governmental information, and does not authorize any notion of selective access. S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).[33]

In *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (emphasis added), this Court squarely rejected the argument that a particular requester's alleged need for the materials in question is a relevant criterion in the application of the FOIA's exemptions:

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[33] In enacting the FOIA, Congress rejected the prior rule, under Section 3(c) of the APA, limiting disclosure of agency records to "persons properly and directly concerned." 5 U.S.C. (1964 ed.) 1002(c). It replaced such restrictions with the general rule of full public disclosure, subject to the nine exemptions, so as to secure "[t]he right of the individual to be able to find out how his Government is operating." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966). See also K. Davis, *Administrative Law Treatise* 171 (Supp. 1970) ("The Act never takes into account the need of the party seeking the disclosure * * *.").

> Sears' rights under the [Freedom of Information] Act are *neither increased nor decreased* by reason of the fact that it claims an interest in the [records] greater than that shared by the the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants.

See also, *e.g.*, *id.* at 149 n.16; *FOMC* v. *Merrill*, 443 U.S. 340, 362-363 (1979) (an "applicant's need for information is not to be taken into account in determining whether materials are exempt" under FOIA); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978) (unless exempted, FOIA requires that records be made available on demand "to any member of the general public"); *EPA* v. *Mink*, 410 U.S. 73, 92 (1973) (FOIA "may be invoked by any member of 'the public'—without a showing of need * * *"); *Forsham* v. *Califano*, 587 F.2d 1128, 1134 (D.C. Cir. 1978) (footnote omitted), aff'd, 445 U.S. 169 (1980) (FOIA secures "the right of any member of the public" to governmental information; "[a]ny showing of need or interest is irrelevant"); *Columbia Packing Co.* v. *United States Department of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977) ("a party's asserted need for documents in connection with litigation will not affect, one way or the other, a determination of whether disclosure is warranted under FOIA"); *Cooper* v. *Department of the Navy*, 558 F.2d 274, 276 (5th Cir. 1977) (footnote omitted) ("under the FOIA—if anyone can have the desired information everyone can"); *Sterling Drug Inc.* v. *FTC*, 450 F.2d 698, 704-705 (D.C. Cir. 1971) (disclosure under FOIA does not depend "upon the needs of a particular litigant").

In short, respondent's right to disclosure of census data pursuant to the FOIA is no greater than the right of any other member of the public. No different result obtains under Exemption 3 in this regard than under any other exemption. If a particular matter is within the operative scope of a protective statute that qualifies under Exemption 3, the matter is exempted from the FOIA, regardless of an individual requester's alleged needs or purposes. By its terms, the FOIA simply "does not apply" to such records. 5 U.S.C. 552(b). Hence, respondent's own needs or purposes have no bearing on the application of Exemption 3 to the particular information that is the subject of his FOIA request.[34]

2. Even if a particular requester's needs were pertinent in determining whether certain information should be disclosed pursuant to the FOIA, respondent has failed to show that disclosure is warranted here. Respondent alleges that access to the address lists is essential if Essex County is to participate "in a meaningful way" in the local review program created by the Census Bureau to aid in the 1980 decennial census. See J.A. 12. That program, as noted above (see pages 3-4 & note 2, *supra*), permits local governments to submit data in useful form to the Bureau. It does not and could not authorize the Bureau to submit raw census data to the local

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[34] Compare *McNichols* v. *Klutznick*, *supra*; *Carey* v. *Klutznick*, *supra*. In these cases the courts of appeals rejected requests for discovery of Census Bureau address lists by local officials who had initiated lawsuits challenging the census results for certain localities. If this material is not disclosable in the context of a case in litigation, where the asserted needs of a party seeking disclosure may be relevant (see Fed. R. Civ. P. 26(b)), then it is certainly not disclosable in response to an FOIA request, where an applicant's need for the information is not a factor to be taken into account.

governments. Moreover, the local review program was created not by statute but by the Census Bureau itself, and the program contains no provision for "discovery" to allow local governments more "meaningful" participation than the Bureau has chosen to provide.[35]

In addition, there is no basis for respondent's assertion that the Bureau's address lists are needed to insure "meaningful" participation in the local review program. As part of that program, the Census Bureau pro- ded each local jurisdiction, including Essex County, with aggregate information for each enumeration district, including the number of housing units, the number of vacant units and population totals. The county could have verified the accuracy of the Bureau's preliminary figures by conducting its own surveys in those enumeration districts where the Bureau's figures were believed to be too low. Numerous local government entities, including units within Essex County, were able to participate in the local review program without the benefit of having access to the Bureau's master address registers. At all events, the legislative history of the Census Act clearly shows that, regardless of need, Congress did not intend to confer upon governmental entities such as Essex County any

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[35] Respondent has also suggested (Br. in Opp. 2) that Essex County "repeatedly offered to make its computerized address data available to the Census Bureau." We are informed that the Bureau has no record of receiving any such offer prior to the commencement of this litigation. In any event, the disorganized list of addresses (compiled from tax records) that respondent belatedly asked the Bureau to compare with its data did not comply with the local review program guidelines and would not have been very useful because tax lists ordinarily do not specify the number of housing units in a given structure (J.A. 56-57, 69-70).

greater right of access to census data than that of any other member of the public (see page 29, *supra*).

The district court nevertheless attempted to circumvent the carefully drawn provisions of the FOIA and the nondisclosure provisions of the Census Act by directing the Census Bureau to "deputize" respondent's employees as sworn officers of the Bureau, pursuant to 13 U.S.C. 23(c) (Pet. App. 13a, 17a).[36] As the Tenth Circuit observed in a similar situation, this provision is a tacit acknowledgment by the district court that its order "constituted an evasion of congressionally mandated confidentiality." *McNichols* v. *Klutznick*, *supra*, 644 F.2d at 845.[37] More-

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[36] In addition, the district court ordered respondent and his agents not to use or disclose the Bureau's address data to any person for any purpose other than participation in the local review program (Pet. App. 19a). The court also ordered petitioners to reconsider as timely under the local review program any submission by respondent following his inspection of the Bureau's address registers (*id.* at 17a).

[37] If disclosure of the materials within respondent's FOIA request does not violate 13 U.S.C. 9, then the oath requirement imposed by the district court is unnecessary and meaningless. See 13 U.S.C. 214. If disclosure of the materials does violate 13 U.S.C. 9, then release to respondent is barred by Exemption 3 of the FOIA.

Furthermore, the restrictions imposed by the district court upon respondent's use of the census materials (see note 36, *supra*) cannot be reconciled with the court's conclusion that disclosure is permissible because respondent's purpose in seeking the materials is to "aid in the accuracy of the census" (Pet. App. 12a). If respondent's alleged purpose were relevant and sufficient to justify disclosure under the FOIA, then any use of the materials consistent with that purpose presumably should have been allowed. The literal terms of the district court's order, however, would appear to prevent respondent from using the census data to bring an action challenging the accuracy of the Census Bureau's population figures for Essex County.

over, it is doubtful whether the FOIA, which was enacted to permit unfettered public disclosure of non-exempt agency records (see *CPSC* v. *GTE Sylvania, Inc., supra,* 447 U.S. at 108-109), authorized the district court to order such extraordinary relief.[38] See *Kissinger* v. *Reporters Committee for Freedom of the Press, supra,* 445 U.S. at 154. But cf. *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 16-20 (1974); *Getman* v. *NLRB,* 450 F.2d 670 (D.C. Cir. 1971). It is inconceivable, for example, that under the FOIA a district court could order the CIA to "deputize" a member of the public in order to allow limited inspection of national security secrets. Thus, the district court's unusual protective order simply reinforces our contention that respondent, regardless of his asserted need for the information, has no greater right of access under the FOIA to the Census Bureau's raw data than has any other member of the public.

The contrary conclusion of the courts below is not only directly at odds with the language and history of both the FOIA and the Census Act, it is bound to undermine the central goal of the Census Act's confidentiality provisions. If it became general public knowledge that local officials may (and do) exer-

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[38] Certainly nothing in 13 U.S.C. 23(c) itself provides a proper basis for the district court's order. That section merely authorizes the Secretary to utilize temporary staff, including federal, state and local government employees, as well as employees of private organizations, "to assist the [Census] Bureau in performing the work authorized by [the Census Act]." The section does not empower the Secretary to hire employees to assist local governments in preparing their submissions under the Bureau's local review program, nor does it grant the district courts authority to oversee the Bureau's hiring decisions under Section 23(c), a matter that is undoubtedly committed to agency discretion by law. See 5 U.S.C. 701(a)(2).

cise a legal right under the FOIA to demand and obtain access to raw census data in order to check its accuracy for "statistical" purposes, public confidence in the integrity of census data would be severely jeopardized. The resulting loss of public cooperation in the conduct of the census would far outweigh the alleged benefits that respondent claims will result from recognizing a right of access for local officials. At best, the policy issue raised by the claimed right of access to raw census data by local officials is one that should be addressed in the first instance by Congress, not by the courts. See *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980); *United States* v. *Rutherford*, 442 U.S. 544, 559 (1979); *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Under the existing legislative scheme, raw census data relating to individual respondents may not be disclosed. Respondent is therefore not entitled to Census Bureau address lists under the FOIA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, Secretary of Commerce, and DANIEL B. LEVINE, Acting Director, Bureau of the Census,

Petitioners,

v.

PETER SHAPIRO, Essex County Executive,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Question Presented

Whether a bare list of street numbers in the possession of the Census Bureau is exempt from disclosure under the Freedom of Information Act, 5 USC 552?

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NO. 80-1436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, Secretary of Commerce, and DANIEL B. LEVINE, Acting Director, Bureau of the Census,

Petitioners,

v.

PETER SHAPIRO, Essex County Executive,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

Statement of the Case

Pursuant to 5 U.S.C. 552(a) (4) (B), of the Freedom of Information Act, 5 U.S.C. 552, (hereinafter referred to as the FOIA), Respondent Peter Shapiro, Essex County executive, commenced suit in the United States District Court for the District of New Jersey to compel the petitioners to

disclose the list of Essex County addresses which the Bureau of the Census utilized in conducting the 1980 census. This information was requested to enable the respondent (hereinafter referred to as county) to participate in a meaningful way in the 1980 Local Review Program sponsored by the petitioners (hereinafter referred to as the Census Bureau or Bureau). (J.A. 9).

The Local Review Program was developed to maximize the accuracy of the 1980 census and to afford local government officials an opportunity to review and comment on the Bureau's population and housing tabulations before those figures became final. (J.A. 59-63 Pet. B. 3-4)[1].

The county has sought to compare the Bureau's list of street numbers with a list prepared by the county in order to identify those addresses of which the Bureau was unaware. The County has repeatedly offered to provide its list to the Bureau so the Bureau could check the completeness of its information. The Bureau has repeatedly refused. (J.A. 18, 55). The Census Bureau argued that pursuant to Exemption 3 of the FOIA, 5 U.S.C. 552 (b) (3), a list of street numbers was specifically exempted from FOIA requests. In connection with this argument, the Cen-

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[1] In footnote 4, page 5, of the petitioner's brief, it is stated that the county submitted to the Bureau a letter identifying five enumeration districts for which the preliminary census figures were believed by the county to be inaccurate. That brief alleges that a recanvassing of those areas by the Bureau resulted in an addition of 45 persons to the count. What that footnote does not tell the court is that the county organized the efforts of local governments within the county which submitted additional data to the Census Bureau. In any event, if it is alleged by petitioners that the county's efforts have not resulted in significant additions to the count, this is further evidence that meaningful participation is not possible without access to the information requested herein.

sus Bureau maintained that the Census Act, 13 U.S.C. 1, et seq., specifically 13 U.S.C. 8 (b) and 9 (a), prohibited disclosure of all raw census data provided by particular individuals, and that this prohibition would include a bare list of addresses. (J.A. 11).

The district court held that Title 13, "does not provide a blanket of confidentiality for any and all census materials." Rather, the court held, the confidentiality requirement is structured to "insure against disclosure of any particular individual's response" (Pet. App. 9a-10a). The district court ordered the Census Bureau to turn over the address list after swearing in county personnel to observe the confidentiality requirements of the Census Act in accord with 13 U.S.C. 23(c). (Pet. App. 16a, 17a).

On appeal the court of appeals affirmed the district court's determination, "for the reasons stated by the district court." (Pet. App. 2a).

Despite the Ceusus Bureau's insistance that the county seeks information that can be identified with particular individuals, the County seeks only access to a bare list of street numbers for Essex County. (J.A. 54-55).

An accurate 1980 Census is essential. A major function of census statistics is to provide information necessary to determine state and local eligibility for federal programs. See S. Rep. No.: 94-1256, 94th Cong., 2d Sess. 1 (1976). These programs serve essential public purposes, and an undercount of the county's population will mean a concomitant reduction in county services. (J.A. 14-17).

The county's request for a bare list of street numbers which does not disclose any information about a particular individual, is directly related to ensuring the accurate enumeration of persons in Essex County. The production of such information under the FOIA does not violate any

provision of the Census Act. Accordingly, the decisions of the district court and the court of appeals should be affirmed.

Summary of the Argument

Under the Freedom of Information Act, 5 U.S.C. 552, the county seeks access to a list of street numbers which the Census Bureau used to conduct the 1980 census in Essex County. The Petitioners argue that sections 8(b) and 9(a) of the Census Act, 13 U.S.C. 1 et seq., prohibit the disclosure of all census data provided by individual respondents, and therefore the information requested by the county is exempt under the FOIA under 5 U.S.C. 552(b)(3), (Exemption 3).

Exemption 3 of the FOIA permits a federal agency to keep information from public view where a statute requires non-disclosure. The Census Act contains such a requirement in sections 8 and 9, but only to the extent that data can be identified with particular individuals.

The Census Bureau will not violate any provision of sections 8 and 9 of the Census Act by providing the county with a list of Essex County street numbers. A bare list of street numbers will not disclose who provided a particular address, how many units are in any dwelling, the identity or number of people living there, whether anyone lives there or whether there is a dwelling there. The petitioners did not even attempt to prove otherwise below, and the trial court's finding that disclosure will not infringe on individual privacy is unassailable.

Accordingly, the decision of the courts below directing petitioners to comply with the county's request for a list of street numbers should be affirmed.

ARGUMENT

Under the FOIA, unless information falls within one of the enumerated exceptions, it must be disclosed to the public.

A. The FOIA philosophy: disclosure is the rule.

The Freedom of Information Act was enacted to provide specific guidelines as to which agency records are to be disclosed to the public. Its predecessor, Section 3 of the Administrative Procedure Act, 5 U.S.C. 1002 (1964 ed.) was frequently utilized by government agencies as a basis for denying access to public records and as such, had been viewed as a withholding statute rather than a disclosure statute. *EPA* v. *Mink*, 410 U.S. 73, 79 (1973); See S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966). The Administrative Procedure Act contained several vague phrases upon which officials could rely to refuse requests for disclosure, such as, "in the public interest", "relating solely to the internal management of an agency," "for good cause shown." Additionally, the information was only available to persons properly and directly concerned. See *G.T.E. Sylvania Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384-85 (1980).

In sharp contrast to Section 3 of the Administrative Procedure Act, the clear mandate of the FOIA is full public access to government information subject to a limited number of clearly delineated and carefully structured exemptions. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978); *FOMC* v. *Merrill*, 443 U.S. 340, 351-52 (1979); S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Unless the requested material falls within one of the exemptions, the FOIA requires that records and material in the possession

of the federal agencies be made available on demand to any member of the general public. *NLRB* v. *Robbins Tire & Rubber Co., supra* at 220-221. The exemptions are made exclusive, 5 U.S.C. 552 (c), and are plainly intended to set up concrete workable standards for determining whether particular materials may be withheld or must be disclosed. The burden is on the agency to substain a decision denying disclosure. 5 U.S.C. 552 (a) (3); *EPA, supra* at 79.

As eloquently stated by Hon. Sam J. Ervin, Jr., United States Senator from North Carolina:

> If America is to continue under a government of law and not of men, the opportunity of every citizen to inform himself about current issues is of supreme importance. Yet, as our government becomes increasingly more complex and bureaucratic, we find it more and more difficult to know how countless thousands of daily administrative decisions are being made, who is making them, and indeed what is actually being said in them.
>
> S. 1666 is an important step toward making the public's right to know a meaningful right. That the public has such a right cannot be disputed, for a democratic form of government presupposes such a right. Without it, the electorate cannot, in any real sense, choose its representatives; for the right to make such a choice certainly includes the right to inform oneself concerning the alternatives. The people only control their government so long as they have a voice in its decisions; but this voice is a nullity if people have no way of informing themselves of government decisions. Freedom of Information Act Hearings on S. 1666 and S. 1663 Before the Subcommittee of Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 35-36 (1963).

In their brief, petitioners argue that when considering the FOIA Congress viewed all census data provided by individual respondents as confidential. See comments of representatives Olsen, Moss, McClosky and Absug, Pet. B. 17-18. However, it is clear even from these comments that Congress did not intend Exemption 3 to extend any greater "non-disclosure status" than had already been provided by the Census Act. When Exemption 3 was being considered by congressional committee, it was observed that there were nearly one hundred statutes or parts of statutes which restricted public access to specific government records and that the FOIA was not meant to modify any of these provisions. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Thus, Exemption 3 only exempts from disclosure that which the Census Act had specifically exempted from disclosure.[2]

B. Exception 3 permits nondisclosure where required by statute.

Exemption 3 of the FOIA provides:

> (b) This section does not apply to matters that are ——
>
> (3) specifically exempted from disclosure by statute . . ., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the

[2] At the time of the FOIA amendment (1966) the 1954 version of the Census Act was in effect. Act of August 31, 1954 ch. 1158, 68 Stat. 1012. As will be noted *infra*, at note 12, this version permitted the discretionary disclosure of identifiable individual data.

> issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; (5 U.S.C. 552 (b) (3))

In order for a statute to qualify as an Exemption 3 statute it must require non disclosure and the statute must either itself clearly state what information must be withheld leaving no discretion to the agency involved, or the statute must clearly set forth guidelines or standards to guide the agency in the determination of what information is to be withheld from the public. See H.R. Rep. No. 94-880, 94 Cong., 2d Sess. 9 (1976)[3]

To the extent that the Census Act prohibits the disclosure of information that can be identified with particular individuals the provisions of the Act qualify as a Exemption 3 statute. As discussed in the following section, however, and as demonstrated by the record, the list of street numbers requested by respondent does not reveal any information about any person and no provision of the Census Law bars its release.

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[3] The importance of the requirements above is exemplified by the ruling in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), and the events occurring after that decision. In that case, the court dealt with a prior version of Exemption 3 which provided that the disclosure sections of the FOIA did not apply to matters that were specifically exempted from disclosure by statute. The non-disclosure statute in that case did not require non-disclosure but merely prohibited disclosure in the Administrator's judgment. Further, the standard set forth in the statute to guide the Administrator's judgment, i.e. disclosure, would adversely affect the interest of the objecting party and disclosure was not required to be disclosed in the public interest, were vague and unclear. Nevertheless, the court determined that the above non disclosure provision was an exemption 3 statute. *Administrator, FAA* at 259. Congress promptly responded to that determination by enacting the present version of Exemption 3.

In their brief, petitioners argue that the production of a list of Essex County street numbers from the Bureau's address registers and other records constitutes a hardship upon the Bureau. Specifically, they state that while it is possible to redact such a list from the Bureau's master address registers and other records, doing so would constitute an administrative burden. Pet. B. 36-37, 37 fn 30[4]

If the petitioners contend that the presence of other data on the Bureau's address records exempt the records from disclosure, then it is the government's burden to prove that the names cannot be deleted prior to disclosure. The FOIA requires that "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt [from disclosure]." 5 U.S.C. 552 (b). The burden of proving that redaction cannot be reasonably accomplished is on the government, 5 U.S.C. 552 (a) (4) (B); *Mead Data Cent., Inc.* v. *U.S. Department of Air Force*, 566 F. 2d 242, 259-262 (D.C. Cir. 1977).[5]

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[4] In fn 30 of Petitioner's Brief, it is stated that, ". . . a list of addresses could be culled from the master address registers for Essex County only by copying the thousands of pages constituting the master address registers and by manually redacting . . . [a] substantial amount of information . . ." This contention is without any foundation in the record below. The county repeatedly sought, through discovery, to determine what would be required for the Bureau to produce a bare list of addresses. The Bureau fought each of those efforts and failed to develop a record on the subject. (R. 23-24, of August 13, 1980).

[5] Congress considered the hardship argument when evaluating the FOIA. Many federal agencies argued that the FOIA would constitute a financial and administrative burden. See Freedom

(Footnote continued on following page)

The petitioners did not even attempt below to demonstrate non-segregability. In fact, they repeatedly refused to produce evidence regarding the extent to which its data was computerized and thus amenable to simple, electronic redaction. The county's motion for discovery on this issue was granted by Judge Sarokin for the express purpose of determining the potential for achieving segregability. (R. 23-24, of August 13, 1980).[6]

Sections 8 and 9 of the Census Act do not prohibit the disclosure of a bare list of street numbers.

Section 8 of the Census Act, 13 U.S.C. 8, provides in relevant part:

(Footnote continued from preceding page)

of Information Hearings S. 1666 and S. 1663, Before the Subcommittee on Administrative Practice and, Procedure of the Senate Committee on the Judiciary, 88th Cong. 1st Sess. 267, 268, 278-279, (1963). Despite these protests, the FOIA specifically contemplated situations in which FOIA requests may require the agency involved to make a "search for" "collect" and "appropriately examine a voluminous amount of separate and distinct records. . . ." 5 U.S.C. 552 (a) (6) (B) (i) (ii). The Act also recognized that in some cases the agency involved must in responding to a FOIA request delete certain exempt portions of agency records. 5 U.S.C. 552 (b). Additionally, the Court has rejected the hardship argument. See *CPSC* v. *GTE Sylvania*, 447 U.S. 102, 123 (1980). Compare *Kissenger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 153-154 (1980); See also S. Rep. No. 93-854, 93 Cong., 2d Sess. 12, where the committee observed, "Nonetheless, the committee believes it desirable to encourage agencies to process request for . . . information even if doing so involves performing services . . ."

[6] The discovery order was later stayed pending appeal.

> (b) Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys . . . for . . . the Federal Government . . . the District of Columbia, . . . the government of any possession or area . . . referred to in section 191(a) . . . state or local agencies, or other public or private persons and agencies.

Section 9 of the Census Act, 13 U.S.C. 9, provides in relevant part:

> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purpose for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

In construing a statute, the starting point for interpretation is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that lan-

guage must ordinarily be regarded as conclusive. *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The clear meaning of section 8(b) and 9(a) prohibit the disclosure only of data which can be identified with particular individuals. Section 9(a) provides that: (1) petitioners may not use any of the data collected for non-statistical purposes; (2) petitioners cannot make any publication of data where any particular respondent can be identified; and (3) petitioners cannot allow anyone other than sworn officers of the Department of Commerce to examine individual reports. None of these limitations prohibit the disclosure of a bare list of street numbers.

Petitioners argue that Section 9(a)(1) of the Census Act limits the use of what it characterizes as "all raw census data" to Bureau personnel for the Bureau's own statistical purpose.[7] (Pet. B. 22). On the contrary however,

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[7] In its brief, petitioners cite H.R.Rep. No. 960, 60th Cong., 1st Sess. 5 (1908) to support their position that section 9(a)(1) limits the use of "raw census data" to Bureau personnel for the Bureau's own statistical purpose, admonishing that only the Bureau's "statistical data" may become public. (Pet. B. 22 fn 18); (See also Pet. B. 76 where it is stated that in considering a prior version of the Census Act, Congress understood that all census schedules and other information obtained by the Census Act was completely confidential). The language referred to by petitioners in H.R. Rep. No. 960 does not support their argument. The pertinent language merely states that the purpose of certain penal provisions in the proposed bill, then under consideration, was to safeguard against the "unauthorized" publicity of data contained on census schedules. Under the Census Act in effect at the time of this report as well as the subsequently enacted version of the 1909 Census Act, the Director of the Census had discretion to authorize the disclosure of such information. Act of Mar. 3, 1899, Ch. 419, Section 21, 30 Stat. 1014, 1020; Act of July 2, 1909,

(Footnote continued on following page)

section 9(a)(1) does not in any manner attempt to distinguish between, to use petitioners' terms, "raw census data", "aggregate statistical data", or "numerical data". It simply states that the Census Bureau may not use any information provided under Title 13 for non-statistical purposes. This prohibition clearly is imposed to prohibit the abuse by Census Bureau personnel of information provided to the Census Bureau. Even petitioners admitted in their court of appeal's brief, at 18 below, that "[Congress in Section 9(a)(1)] did not intend to establish standards or criteria for public release, even on a limited basis".[8]

Section 9(a)(2) only prevents the publication of data where the establishment or the individual furnishing the data can be identified. This provision also would not prevent the disclosure of a bare list of street numbers. The county does not seek access to any information which reveals anything about any particular individual respondent. A bare list of street numbers simply does not reveal the

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(Footnote continued from preceding page)

Ch. 2, Section 32, 36 Stat. 1, 8. Additionally, the acts by their own wording allowed the disclosure of information contained on census schedules. Section 30 of the 1899 Census Act gave governors of states, or territories and municipal governments access to information contained on census schedules. Section 32 of the 1909 Act in addition gave access of such information to courts of records and to individuals. Thus, petitioners argument in this regard is without merit.

[8] In any event, if petitioners insist that section 9(a)(1) is a limitation on disclosure of the data requested here, it is noted that the county has maintained throughout this proceeding, and petitioners have not persuasively shown otherwise, that it seeks such information to enhance the accurate enumeration of persons residing in Essex County, thus in furtherance of the Bureau's own "statistical purpose".

identity of any individual (s) or business (es) or even the existence of any individual (s) or business(es) at any address. The county has not requested any information about the type of dwelling, the number of units, or the number of persons residing therein. Because the information requested by the county is so innocuous and does not reveal anything at all about any individual, it is impossible for any government to utilize this data for any purpose of prosecution.

Section 9(a) (3) of the Census Act directs Bureau personnel to prohibit observation by non-personnel of individual census reports. The county does not seek access to individual reports. It only seeks access to the list of street numbers used by the Census Bureau in conducting the 1980 census. Thus, based upon a plain reading of section 9(a), none of its provisions prevents the disclosure of a bare list of street numbers.

Section 8(b) of the Census Act authorizes the census bureau to disclose data which is not individually identifiable, and to conduct studies and surveys for federal, state, local and private entities. The present version of section 8(b) was enacted in 1976. 13 U.S.C. 8(b) (1976). In a House report accompanying the 1976 amendment it was observed:

> Section 8(b) currently allows the secretary to furnish Census records and to undertake special statistical activities for certain public and private entities upon the payment of the cost involved. The House Amendment prohibits the furnishing of statistical information which discloses information reported by or on behalf of any respondent. H.R. Rep. No. 94-1719, 94th Cong. 2d Sess. 10 (1976).

Section 9 describes section 8 as the exception to the prohibitions of Section 9. The list of street numbers sought

by the county is not barred from disclosure by 13 U.S.C. 9 and there is, consequently, no need to consider the statutory exceptions to section 9's prohibition.

Even so, the petitioners misconceive the scope of disclosure permitted under section 8. Section 8 allows disclosure of "tabulations" and "statistical materials" which do not disclose the information reported by, or on behalf of, any particular respondent . . .". The concern here, as in section 9, is to preclude disclosures that identify individuals. A list of street numbers does not provide any such information and, hence, section 8 provides specific authority for disclosure. Neither "tabulations" nor "statistical materials" is defined in the census statute.[9] A list of street numbers is not a tabulation, but such a list must naturally be included within the term "statistical materials".

Moreover, when Congress attempted a definition of statistical records in the Privay Act, 5 U.S.C. 552 (a) *et seq*,

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[9] In its brief, petitioners argued that section 8(b) prohibited the disclosure of all "raw census data". (Pet. B. 7-8, 20, 25, 26). Petitioners thereupon attempt to distort the meaning of "tabulations" and "statistical materials" required to be released by section 8(b) to mean only "aggregate data" or "numerical data". This distortion necessarily raises the question of whether the census statute is clear with respect to what information should be disclosed, or if the statute sets "clear" standards. Apparently, petitioners themselves raised the question of their Exemption 3 status.

Obviously the statute is clear. It prohibits the disclosure of identifiable individual information. Neither section 8 or section 9 make any express or implied reference to raw census data. What those sections do provide is that the Census Bureau cannot release data which identifies an individual.

such was defined broadly as, ". . . a record . . . maintained for statistical research or reporting purposes. . . .". 5 U.S.C. 552 (a) (b).[10]

Petitioners cite *Seymore* v. *Barabba*, 559 F. 2d 806 (D.C. Cir. 1977), *McNicholas* v. *Klutznick*, 644 F. 2d 844 (10th Cir. 1981) cert. granted, No. 80-1781 (June 15, 1981), and 36 Op. Atty's Gen. 362 (1930) to support its position that all census data provided to it by respondents is confidential. However, the holding in *Seymore* that names and addresses together with other identifying information is not subject to disclosure under the Census Act is distinguishable because such information (names, addresses and other identifying information with respect to individual respondents) when submitted in combination clearly revealed the

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[10] Petitioners argue that in evaluating the Privacy Act, 5 U.S.C. 552 (a) Congress construed the Census Act as prohibiting the disclosure of all census data relating to an individual. (Pet. B. 31-32). This argument should be rejected. Like the non-disclosure provisions of the Census Act, the Privacy Act sought to prevent the disclosure by federal agencies of records containing personal information about an individual. In a congressional report accompanying the act, it was observed that the Privacy Act would prohibit the transfer of records between federal agencies "unless the record is in the form that it is not individually identifiable". It was noted that the exception to this rule allowed such transfers to the Census Bureau because the Census Act also prohibited the disclosure of individually identifiable records. H.R. Rep. No. 93-1416, 93rd Cong., 2d Sess. 12-13 (1974). This authorization for transfer does not support petitioners' position that Congress read the Census Act to prohibit the disclosure of all census data provided by an individual. In fact Congress refused to apply the access, challenge and review of records provisions of the Privacy Act to census data because the Senate Committee believed that before applying those provisions a careful review of the Census Act was necessary. S. Rep. No. 93-1183, 93rd Cong., 2d. Sess. 77 (1974).

identity of individual respondents, and further disclosed that specific information was provided to the Census Bureau by specific respondents. The opinion of the Attorney General is distinguishable on the same basis. In the opinion it was stated that the Womens' Bureau sought access to the names, addresses, occupation and status of employment of workers in the City of Rochester, New York. Clearly, this information, if provided in combination, would reveal information about particular individual respondents. In contrast to these cases, the disclosure of the above list of street numbers does not disclose any information about a particular respondent.

In *McNicholas,* the City of Denver sought access to the Bureau's vacancy lists setting out the vacancy status of individual dwelling units in the City and County of Denver. Unlike that case the county's request here is for a list of street addresses which does not reveal any information about an individual. A list of street addresses does not identify who provided a particular address, who lives there, how many people live there, whether anyone lives there, what type of dwelling is there, or whether there is a dwelling there. There is simply no way in which street addresses could reveal the occupancy status of a dwelling or the presence or absence of an individual therein.

In order to indulge petitioners with respect to the county's intentions, the county consented, in accord with the district court's request to have its personnel sworn in the manner referred to in 13 U.S.C. 23(c) so that county personnel would be subject to the penal sanctions imposed upon petitioners' personnel. See 13 U.S.C. 214. This provision of the order was not sought by the county and, respondent submits, was not required.

The argument made by petitioners that the district court's ruling is a "tacit acknowledgment" that its order "constitutes an evasion of congressionally mandated confidentiality" is without merits. Pet. B. 43-44. Any fair-minded reading of the district court's decision makes it clear that the court found that the information sought by the county was not confidential.

Moreover, with the exception of *McNicholas, supra,* the cases cited by petitioners in connection with this contention only stand for the proposition that where Congress has enacted a statute and has provided a specific remedy for violation, and it appears from the statutory language and history that the remedy provided is exclusive, the court is not free to construct an alternate remedy.[11]

Although the opinion in *McNicholas* specifically stated that the district court's order represented a tacit admission that the information was exempt from disclosure, that decision is without precedent and contrary to the holding in *Renegotiation Board, supra* at 19 wherein the court stated with respect to the FOIA, "With the express vesting of equitable jurisdiction in the district court by 552 (a), there is little to suggest, despite the Act's purpose, that Congress sought to limit the inherent powers of an equity court." Accordingly, petitioners' assertion that the district court's action was inappropriate and constituted an admission should be rejected.

While Congress has passed numerous amendments to the Census Act establishing the confidential nature of information provided by a particular individual, Pet. B. 27, the amendments do not support a general ban on

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[11] See *T.V.A.* v. *Hill,* 437 U.S. 153, 194 (1978); *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 18 (1974); *Diamond* v. *Chakrabarty,* 447 U.S. 303, 318 (1980); *United States* v. *Rutherford,* 442 U.S. 544, 559 (1979).

the disclosure of all census data. Rather, the amendments reflect Congress' concern about the disclosure of identifiable individual data.[12]

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[12] Up until the recent 1976 amendments of the Census Act, Act of Oct. 17, 1976, 94-521, 90 Stat. 2459, the Act allowed the discretionary disclosure of all census data including individual data. From 1790 to 1830, census schedules were subject to public view. Act of March 1, 1790, ch. 2, Section 7, 1 Stat. 101, 103; Act of Feb. 28, 1800, ch. 12, Section 7, 2 Stat. 11, 13; Act of Mar. 26, 1810, ch. 17, Section 7, 2 Stat. 564, 567-568; Act of Mar. 14, 1820, ch. 24, Section 7, 3 Stat. 548, 549.

From 1830 to 1879, there were no provisions in the census statutes for public view of census schedules, nor were there any confidentiality provisions. Act of Mar. 23, 1830, ch. 24, 4 Stat. 383; Act of Mar. 3, 1839, ch. 80, 5 Stat. 331; Act of May 23, 1850, ch. 43, 9 Stat. 428. In 1879 Section 7 of the census act required that enumerators take an oath affirming or swearing not to disclose information contained in census schedules. Additionally Section 12 provided that unauthorized disclosure of census data constituted a misdemeanor. Act of Mar. 3, 1879, ch. 195, Sections 7, 12, 20, Stat. 473, 475, 476. The Act of Mar. 1, 1889, ch. 318, Sections 8, 13, 23, 25, Stat. 760, 763, 764, 767, again provided in Section 8 the non-disclosure provision in the oath. Section 13 set forth a penalty for disclosure, "without the authority of the superintendent". Despite the non-disclosure provisions in the 1889 Act however, Section 23 permitted disclosure of information contained in census schedules to municipal governments. In the Act of Mar. 3, 1899, ch. 419, Section 30, 30 Stat. 1014, 1021, the disclosure of such information was broadened to include ". . . governors of any State or Territory", and in the Act of July 2, 1909, ch. 2, Section 32, 36 Stat. 1, 8, Congress again broadened the category to include disclosure of such information to courts of records and individuals. This authorization of disclosure continued up until the 1976 amendment. See Act of Mar. 3, 1919, ch. 97, Section 33, 40 Stat. 1291, 1302; Act of June 18, 1929, ch. 28, Section 18, 46 Stat. 21, 25; Act of Aug. 31, 1954, ch. 1158, Section 8, 68 Stat. 1012, 1013.

(Footnote continued on following page)

The 1976 Amendment to the Census Act was designed to protect the individual's right not to be identified to non-bureau personnel by the information which he or she provided to the Census Bureau. The purpose of that amendment was not to grant a right to the Bureau to keep all "raw census data" free from FOIA requests.

There is no significant legislative history with respect to the 1976 amendment to Section 8. Thus the Legislative history of the 1969 and 1972 proposed amendments containing substantially identical language should be examined.[18]

The clear concern of Congress when considering the amendments was not the confidentiality of raw census data, but the individual's right to privacy and the individual's expectation that identifiable information would be kept confidential. In this regard representative Broyhill stated:

> Specifically, my people are asking that the facts they furnish to the census not be placed on computer tapes *corresponding with their names.* 115 Cong. Rec. 27033 (1969) (Emphasis added.)

(Footnote continued from preceding page)

Thus, the history of the Census Act itself does not lend credibility to petitioners' argument that Congress has designated all raw census data as confidential. On the contrary, as shown above, prior amendments to the Census Act increasingly permitted disclosure subject to the Bureau's discretion.

[18] See House Bills 12884 and 14153. Both bills eliminated the authority of the Secretary to provide access to individual data to courts of records, States, territories and individuals. Both bills revised Section 8 to permit disclosure only of information which would not disclose identifiable information reported by a particular individual. H.R. Rep. No. 91-407, 91st Cong., 1st Sess. 6-7, 14-15 (1969); H.R. Rep. No. 92-1288, 92nd Cong., 2d Sess. 11, 20-21 (1972).

In both committee reports evaluating the proposed amendments to Section 8, it was observed that section 8(b) authorized the furnishing of tables and other census records without regard to the privacy of the individual, and that the amendments "would continue the foregoing authorization"; that is, the Census Bureau could continue to make tables and census records available except that, under the amendments, disclosure of information which could be identified with particular individuals was now prohibited. H. R. Rep. No. 91-407, supra, at p. 7; H.R. Rep. No. 92-1288, supra, at p. 11.

The petitioners argue that disclosure of street number data will discourage public participation in the census. This argument is without merit. It is the assurance that the individual will not be identified or penalized by non Bureau personnel and not a general ban on the disclosure of all census data that assures the voluntary participation in the census. If public concern exists, it is undoubtedly a result of the Bureau's own baseless complaint that the courts are compelling disclosure of confidential material. There is no reason to believe that release of street address data is itself a matter of public concern; in fact, the record is absolutely barren of factual support for the Bureau's claim. The greater concern must be that an accurate census be conducted.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 80-1436

In the Supreme Court of the United States

OCTOBER TERM, 1981

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, AND BRUCE K. CHAPMAN, DIRECTOR, BUREAU OF THE CENSUS, PETITIONERS

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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We note at the outset that this case has been consolidated for argument with *McNichols* v. *Baldrige*, No. 80-1781, and that both respondent here and the petitioners in *McNichols* have sought to distinguish the two cases on their facts. Respondent correctly points out that this case concerns a request for disclosure of Census Bureau information under the Freedom of Information Act, while *McNichols* involves a civil discovery request for census information made in the course of a lawsuit challenging the census results for a particular locality. In addition,

respondent notes that the information sought in the instant case consists of all street addresses within the locality, whereas in *McNichols* the request is limited to the Bureau's lists of vacant dwelling units.[1]

In our view, these factual distinctions should not lead to different results. In both cases, the decisive question is whether Congress, in the Census Act, has prohibited the disclosure of Census Bureau address lists and other similar raw census information relating to individual census respondents. As we have argued in our opening brief in this case and in our brief in *McNichols*, the language, structure, history and purpose of the Census Act all compel an affirmative response to this question.

1. Respondent argues, however, that address lists utilized by the Census Bureau in carrying out its duties under the Census Act are not confidential under 13 U.S.C. 8(b) and 9(a) because, according to respondent (Br. 4, 12), address information is not "identified with" particular individuals. We do not know what respondent means in using the term "identified with."[2] That term does not appear in the

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[1] Respondent Shapiro asserts (Br. 17) that, unlike the petitioners in *McNichols*, he should be entitled to disclosure of address lists because such disclosure will not reveal the occupancy status of a building. The *McNichols* petitioners, on the other hand, allege (80-1781 Pet. Br. 21) that disclosure of addresses of vacant dwellings is permissible because if the dwellings are indeed vacant no one will be harmed. As we demonstrate in our main briefs in the two cases, both arguments are flawed.

[2] If respondent is arguing that the confidentiality provisions of the Census Act are designed simply to protect the identities (*i.e.*, names) of individuals and establishments, the argument is plainly wrong. See pages 5-6, *infra*.

text of 13 U.S.C. 8(b) or 9(a), nor does any judicial decision cited by respondent use that term as a test of what Congress meant in enacting the confidentiality provisions of the Census Act. If respondent is offering the amorphous phrase "identified with" as a test to be adopted by this Court, we believe the proposal should be firmly rejected. Such a test is wholly devoid of precision, workability, and statutory foundation.

In contrast, the test urged by the government concerning the scope of the confidentiality provisions of 13 U.S.C. 8(b) and 9(a) is precise, workable, and fully supported by the statutory wording and purpose of the Census Act. The government's position is that all raw census data relating to particular individuals or establishments (as distinguished from aggregate statistical data) is subject to the confidentiality mandate of the Census Act. Raw census data relating to individuals and establishments plainly includes addresses of residential dwellings. Such raw data in the possession of the Census Bureau is strictly confidential.

The government's position is firmly based on the language of 13 U.S.C. 8(b) and 9(a). In its express limitation upon the disclosure of "statistical materials," Section 8(b), as amended in 1976, incorporates the confidentiality mandate found in Section 9 of the Census Act. Under that mandate, only statistical materials (*i.e.*, aggregate statistics) that "do not disclose the information reported by, or on behalf of, any particular respondent" may be furnished to members of the public. 13 U.S.C. 8(b). The category of data prohibited from disclosure clearly includes information reported to the Census Bureau that relates to a particular individual, including the individual's address. Such data may not be dis-

closed, regardless whether the particular individual's name is withheld and regardless whether the data were originally reported to the Census Bureau by a person other than the occupant or owner of the residence in question.

Respondent attempts to avoid the clear thrust of the limiting language in Section 8(b) by arguing (1) that no limitation in Section 8(b) should apply if Section 9(a) itself does not apply (Br. 14-15); (2) that Section 9(a) assertedly does not apply to address lists or other raw census data used by the Census Bureau if a member of the public requests such data for a "statistical purpose" (Br. 13 n.8); and (3) that address lists "must naturally be included within the term 'statistical materials'" under Section 8(b) and should be disclosed notwithstanding the statutory limitations (Br. 15).

This convoluted argument is without merit. The limitation in Section 8(b) and the proscriptions in Section 9(a) are intended to accomplish the same purpose.[3] As we show in our opening brief (at 33-34 & n.25), the manifest intention of these provisions is to assure the public, whose cooperation is essential for an accurate census enumeration, that census data relating to particular individuals will remain confidential. No member of the public would seriously believe that the Census Bureau maintains its pledge of confidentiality if the Bureau were to divulge residential address data or other raw census data to local officials whenever they may choose to challenge the census results.

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[3] Regarding respondent's argument that address lists are "statistical materials" under Section 8(b), the D.C. Circuit in *Seymour* v. *Barabba*, 559 F.2d 806, 809 (1977), squarely held that "names and *addresses*" are not included within the term (emphasis added).

a. The confidentiality provisions of Section 9(a) traditionally have been regarded as sufficient expressions of the Bureau's longstanding policy of maintaining the strict secrecy of census data relating to individuals. At least until the district court's decision in this case, the wording of Section 9(a)(1)—prohibiting the Census Bureau from making any "use [of] the information furnished under [the Census Act] for any purpose other than the statistical purposes for which it is supplied"—was thought to be "a flat barrier to disclosure with no exercise of discretion permitted." *Seymour* v. *Barabba*, 559 F.2d 806, 808 (D.C. Cir. 1977). There is no doubt that publication or disclosure of raw census data by the Census Bureau would be a "use" of such data, and a "use" that Congress plainly intended to prevent.[4] The fact that respondent Shapiro and the petitioners in *McNichols* are alleging that *their* proposed use of the data is also for a statistical purpose, or is even a "use" that is consistent with the statistical purposes of the census, does not affect the prohibition in Section 9(a)(1) against use of raw census data for any purpose other than the *Bureau's* development of statistics.

b. Even if release of the Bureau's address lists to a party challenging census results would not violate Section 9(a)(1), such disclosure nevertheless would run afoul of Section 9(a)(2), which prohibits "any publication whereby the *data* furnished by any particular establishment or individual * * * can be identified." 13 U.S.C. 9(a)(2) (emphasis added). This

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[4] Section 9(b) of the Act confirms that "[t]he provisions of subsection (a) of this section relat[e] to *the confidential treatment of data for particular individuals and establishments* * * *." 13 U.S.C. 9(b) (emphasis added).

provision clearly means that identifiable data (*i.e.*, raw or non-aggregated data), including address data, pertaining to individuals or establishments, are confidential. There is no basis for respondent's repeated assertion (Resp. Br. 4, 12, 13, 15) that Section 9(a)(2) protects only the identities (*i.e.*, the names) of census respondents. As we have argued in our brief in *McNichols* (80-1781 Resp. Br. 18-19), the prohibition in Section 9(a)(2) clearly protects all identifiable data *relating to* particular respondents, not merely to data that directly *identifies* particular respondents. Addresses of residential dwellings plainly constitute identifiable data within the meaning of the proscription of Section 9(a)(2).[5]

c. Finally, Section 9(a)(3) of the Act prohibits persons other than Census Bureau officials and employees from examining individual reports. Master address registers are a compilation of address data that also appear on individual census reports. It is difficult, if not impossible, to believe that Congress intended its protections to be so weak as to permit the examination of raw information that appears on individual reports so long as that information is reprinted by the Bureau on another type of document.

The language of the Act plainly reveals the legislative intention to maintain strict confidentiality with

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[5] As we pointed out in our opening brief (at 36-37), while disclosure of this type of information may not reveal directly the identity of a particular individual, it would reveal information reported by or on behalf of individual census respondents and such information could be used to the individual's detriment. This result would be contrary to the intent of Congress, which expressly prohibited use of census information "to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title." 13 U.S.C. 8(c).

respect to raw census data in the hands of the Census Bureau relating to particular respondents. Only aggregate statistical materials—totals and subtotals of numerical figures—may be disclosed. Names, addresses or other raw data relating to individual respondents may not be disclosed. This is a clear, workable, and statutorily grounded distinction. Strict confidentiality of raw census data, and the public's perception of such confidentiality, is essential to fulfillment of the underlying purpose of an accurate census. This public perception of confidentiality cannot be assured in the face of amorphous tests, distinctions, and exceptions of the type urged by respondent.

2. Respondent argues that the legislative history of the Census Act reflects Congress' intention to protect only "identifiable individual data" (Resp. Br. 19). But this characterization of the scope of the Census Act's confidentiality mandate is not materially different from our own view that Congress meant to prohibit disclosure of all raw census data relating to individual respondents, such as lists containing addresses of individual dwelling units. If respondent is contending that particular addresses are not identifiable information, he is plainly wrong. Moreover, as we showed in our opening brief (at 16-18, 25-29), the legislative histories of not only the Census Act, but of the FOIA and Privacy Act as well, confirm that address lists and any other raw census information pertaining to individual persons or establishments are not subject to disclosure.

a. Respondent mistakenly contends (Br. 19 n.12) that, until the 1976 amendments to the Census Act, the Census Bureau was authorized, within its discre-

tion, to disclose "all census data including individual data." While it is true that the census statutes enacted in 1889 and 1899 contained provisions directing the Census Director to provide local government officials with information relating to individuals, in the succeeding Census Acts the authority of the Director to disclose such information was narrowed considerably. The 1889 Act provided for disclosure upon request and for a fee, to "any municipal government," of "the names, * * * age, sex, birthplace and color, or race of all persons enumerated" within the municipality's jurisdiction. Act of Mar. 1, 1889, ch. 319, Section 23, 25 Stat. 767.[6] The 1899 Act similarly provided for disclosure of "only" such information to states as well as to municipal governments. Act of Mar. 3, 1899, ch. 419, Section 30, 30 Stat. 1021.

In 1909 and in subsequent years, however, the Census Acts were modified to authorize the Census Director, in his discretion, to furnish state governors or courts of record "with certified copies of so much of the population or agricultural returns as may be requested." Act of July 2, 1909, ch. 2, Section 32, 36 Stat. 10. At the same time, the Act permitted the Director "to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes." *Ibid.* See Act of Mar. 3, 1919, ch. 97, Section 33, 40 Stat. 1301-1302; Act of June 18, 1929, ch. 28, Section 18, 46 Stat. 25-26. Thus, the 1909 Act and subsequent Acts no longer authorized disclosure to municipal

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[6] The statute that was in effect prior to 1889 required each enumerator to file with the clerk of the county court a list of all persons enumerated by him. The statute provided for public notification of the filing and for procedures to correct any errors in the enumeration. Act of Apr. 20, 1880, ch. 57, Section 6, 21 Stat. 75-76.

governments.[7] More importantly, these Acts no longer made reference to the routine disclosure of specific types of information relating to individuals, but rather permitted state governments and courts to receive only certified copies of the returns, *i.e.*, "a certificate of the *totals* arrived at." *Commonwealth ex rel. Woodring* v. *Walter*, 274 Pa. 553, 554, 118 A. 510, 511 (1922) (emphasis added). Information from the population "schedules" relating to individual respondents was made available only in a limited way for genealogical or similar legitimate purposes. In census parlance, "returns" refer to statistical results of the census, which are based on "schedules" containing responses to census inquiries.[8] Further-

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[7] Beginning in 1919, the Census Act authorized the Census Director to "furnish transcripts of tables and other records and to prepare special statistical compilations for State or local officials, private concerns, or individuals upon the payment of the actual cost of such work." Section 33 of the 1919 Act, 40 Stat. 1302. See also Section 18 of the 1929 Act, 46 Stat. 26; 13 U.S.C. (1970 ed.) 8(b). This provision, the predecessor to Section 8(b) of the current Act, quite clearly was limited to release of aggregate statistical data and did not permit disclosure of raw census data, such as lists of individual addresses.

[8] Prior to the 1960 census, when the Census Bureau first employed the mails as the principal method of collecting census responses to questionnaires, information in the decennial census was collected directly by census enumerators and recorded on schedules. See *Twenty Censuses, Population and Housing Questions: 1790-1980* (Department of Commerce 1979). Indeed, until 1976, the Census Act referred to "schedules" rather than "questionnaires." Compare 13 U.S.C. (1970 ed.) 5, with 13 U.S.C. 5. Contemporaneous dictionary definitions support the distinction drawn in the statutes between "returns" and "schedules." See 8 J. Murray, *New English Dictionary* (1914) (defining "return" in this context as "[a] report of a formal or official character giving information as

more, Section 25 of the 1909 Act, the forerunner of current Section 9(a), prohibited census officials from making publications "whereby the data furnished by any particular establishment can be identified" and from permitting anyone other than sworn census employees "to examine the individual reports." 36 Stat. 9. This provision was deemed desirable in order "to enlist that public confidence without which census inquiries must fail." H.R. Rep. No. 960, 60th Cong., 1st Sess. 23 (1908). Moreover, in enacting these provisions Congress acknowledged that

> [i]t is the policy of the Census Office to consider all schedules and other information officially obtained as for use exclusively for statistical purposes, and information is given in the confidence that that policy will be observed. The office is not a general information bureau, excepting for purely statistical data.

Id. at 5.

Congress further strengthened the confidentiality provisions of the Census Act in subsequent years. In 1919, Congress prohibited the use of census information "to the detriment of the person * * * to whom such information relates." Section 33, 40 Stat. 1302. And in 1929, Congress amended the Act to bar any publication that might identify the data furnished "by any particular establishment *or individual* * * *."

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to the numbers, amounts, etc., of the subjects of inquiry; a set of statistics compiled by order of some authority," and defining "schedule" in this context as "any tabular or classified statement, esp. one arranged under headings prescribed by official authority, as, e.g. an insolvent's statement of assets and liabilities, a return of particulars liable to income or other tax, and the like. Also occas. a blank form to be filled up by the insertion of particulars under the several headings."

Section 11, 46 Stat. 25 (emphasis added). Thus, contrary to respondent's contention (Br. 20 n.12), the pre-1976 amendments to the Census Act increasingly restricted disclosure.[9]

b. In 1976, Congress amended Section 8 of the Census Act to ensure further the confidentiality of raw census data. Section 8(a), as amended, permits the disclosure of information furnished by or on behalf of census respondents only to the respondents themselves, or their heirs, successors or authorized agents. See H.R. Conf. Rep. No. 94-1719, 94th

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[9] In Section 8 of its 1954 codification of the Census Act (Act of Aug. 31, 1954, ch. 1158, Section 8, 68 Stat. 1013), Congress inadvertently obfuscated the previous distinction between nonconfidential totals contained in the returns and the confidential information from population schedules that could be provided to individuals only for genealogical and other proper purposes. The 1954 codification authorized the Secretary, on request and in his discretion, to "furnish to Governors of States and Territories, courts of record, and individuals, data for genealogical and other proper purposes, from the population, agriculture, and housing *schedules* * * *." 13 U.S.C. (1970 ed.) 8(a) (emphasis added). There is no basis, however, for concluding that this new language was intended to create a new exception to the confidentiality mandate of the Census Act. The purpose of the 1954 codification was simply "to put the law in a form more useful and understandable," not "to make substantive changes." H.R. Rep. No. 1980, 83d Cong., 2d Sess. 1 (1954); S. Rep. No. 2497, 83d Cong., 2d Sess. 3 (1954). Case law interpreting the pre-1976 Census Act confirms that disclosure of raw census information in the hands of the Census Bureau relating to particular individuals or establishments was prohibited. See *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 217, 218 (1961); *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568, 569-570 (S.D.N.Y. 1958); *United States* v. *International Business Machines Corp.*, 1975-2 Trade Cas. (CCH) ¶ 60,383 (S.D.N.Y. 1975).

Cong., 2d Sess. 10 (1976); S. Rep. No. 94-1256, 94th Cong., 2d Sess. 3-4 (1976); H.R. Rep. No. 94-944, 94th Cong., 2d Sess. 5 (1976). The Senate Report noted that these changes were consistent with the Census Bureau's present practice. S. Rep. No. 94-1256, *supra*, at 4. See 15 C.F.R. Part 80 (1976). In addition, the Report stated that Section 8(b) of the Act, as amended, "ensures that the authority of the Secretary of Commerce to furnish statistical tabulations or other material to public and private entities does not extend to any material which might disclose information reported by, or on behalf of, any respondent." S. Rep. No. 94-1256, *supra*, at 4. Finally, the Report observed that the amendment to Section 8(c), providing for access to "documentary evidence in the prosecution of those who would violate the confidentiality of the census records" was necessary "[t]o guarantee the privacy of respondents." S. Rep. No. 94-1256, *supra*, at 4. Thus, the history of the 1976 amendments establishes that there is no reasonable basis for respondent's claim that the Census Act, as currently in effect, permits the disclosure to local government officials of lists of individual addresses or other similar raw census data.[10]

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[10] We note that respondent purports to rely (Br. 20-21 & n.13) on the history of certain unenacted legislative proposals (H.R. 12884, 91st Cong., 1st Sess. (1969), and H.R. 14153, 92d Cong., 2d Sess. (1972)). To the extent that this history sheds light on the 1976 amendments to the Census Act, however, it strongly supports our submission that Congress was concerned with ensuring the confidentiality of raw census information relating to particular respondents. See H.R. Rep. No. 92-1288, 92d Cong., 2d Sess. 11-12 (1972); H.R. Rep. No. 91-407, 91st Cong., 1st Sess. 6-8 (1969); 115 Cong. Rec. 27019 (1969) (remarks of Rep. Wilson); *id.* at 27020 (re-

In fact, in 1977 Congress refused to enact legislation that would have authorized the Secretary of Commerce to allow state or local government officials challenging the Census Bureau's estimates to have access to the data on which the estimates were based. H.R. 8871, 95th Cong., 1st Sess. (1977). This proposal would have given local government officials, such as respondent and the petitioners in *McNichols*, access to the very same types of raw census data that they now claim they are entitled to examine under present law. The criticisms levelled at this proposal apply with equal force to respondent's claimed right of access to raw census information relating to individual respondents. For example, Courtenay M. Slater, Chief Economist for the Department of Commerce, stated:

> The success of Census Bureau data collection efforts is dependent on public trust that the confidentiality of individual responses will be protected. The Bureau has a long and proud record of rigorous protection of confidentiality. H.R. 8871 would permit access to Census Bureau records by many, many diverse persons who are not Census Bureau employees. It is inevitable that this would erode the public's confidence that the privacy of their responses can continue to be protected. It is hard for me to think of anything more certain to increase the undercount in the 1980 census than public fear that confidentiality might be breached.

The Census Reform Act: Hearings on H.R. 8871 Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service,

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marks of Rep. Meskill); *id.* at 27024 (remarks of Rep. Gallagher); *id.* at 27033 (remarks of Rep. Broyhill).

95th Cong., 1st Sess. 34 (1977). See *id.* at 13 (statement of Richard Scammon, former Census Director); *id.* at 43-44 (statement of Census Director Manuel D. Plotkin); *id.* at 63 (letter from C.L. Haslam, General Counsel, Department of Commerce).

3. Finally, we note that the New York amici refer (Br. 13) to an incident in which a census employee in Peekskill, New York, disclosed to local government officials address registers for several enumeration districts within Peekskill. But this isolated instance of an unauthorized disclosure by a low-level census employee of a small number of address registers—an action that was plainly contrary both to the Census Act and to the Bureau's firm policy of nondisclosure of such information—hardly supports respondent's position. The disclosure met with prompt Census Bureau disapproval and instructions not to repeat the practice. Moreover, the mere fact that a government employee acted improperly on one occasion does not estop the government from insisting that the law be complied with or change the meaning of a statute. See *Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981); *INS* v. *Hibi*, 441 U.S. 5, 8-9 (1973); *Federal Crop Insurance Co.* v. *Merrill*, 332 U.S. 380 (1947).[11]

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[11] That the Census Bureau takes seriously its obligation to ensure the confidentiality of raw census data is underscored by the fact that in the New York litigation the Bureau refused to comply with a district court order compelling the disclosure of master address registers. As a sanction for this refusal, the district court precluded the government from rebutting New York's claim that the census in New York was mismanaged and was grossly inaccurate. *Carey* v. *Klutznick*, 508 F.Supp. 420 (S.D.N.Y. 1980), rev'd, 653 F.2d 732 (2d Cir. 1981), petition for cert. pending, No. 81-752. Thus, the government risked an adverse decision on the merits in New York simply to trigger an appellate test of the Bureau's confidentiality claim. (Unlike the Tenth Circuit in *McNichols*,

As we have already explained, the major purpose of the statutes protecting census confidentiality is to foster public participation and confidence in the decennial census. The key to this participation and confidence is the public's perception that information they give the Census Bureau for statistical purposes will not be released to others. That perception may survive an isolated and unauthorized disclosure in upstate New York, which receives no great notoriety, but it may well evaporate in the face of court orders piercing the confidentiality shield whenever a local government demands access to heretofore nonpublic census materials. That is the danger inherent in the district courts' disclosure orders in this case and in *McNichols*, and that is the danger this Court can eliminate by effectuating Congress' plain intent that raw census information relating to individual respondents is not subject to public disclosure.

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1981

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the Second Circuit refused to permit an interlocutory appeal from the district court's disclosure order.)

Further evidence that the government takes seriously the confidentiality mandate of the Census Act is provided by the recent indictment of a Census Bureau employee for knowingly disclosing information from the 1980 census that came into her possession in the course of her employment, in violation of 13 U.S.C. 214. *United States* v. *Hibler*, No. 81-30245 (M.D. Tenn., filed Nov. 18, 1981).

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No. 80-1436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, Secretary of Commerce, *et al.*,
Petitioners,

v.

PETER SHAPIRO, Essex County Executive,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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No. 80-1436

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October Term 1980

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BRIEF FOR AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Interest of Amicus Curiae

The Mexican American Legal Defense and Educational Fund (MALDEF) is a non-profit corporation established to protect and extend the civil rights of Mexican Americans and other Hispanics in the United States. A major

goal of the organization since its inception has been to enforce the constitutional guarantee of equal representation for equal numbers of people. A basic mechanism for achieving this goal is to ensure that the Census Bureau has accurately assessed the number of Hispanics within the population.

MALDEF has challenged the accuracy of census counts in various parts of the country, alleging that racial minority and low-income populations, including Mexican Americans, were disproportionately undercounted in the 1980 census, thereby adversely affecting their political representation and access to certain grant programs.[1] In many instances, including the cases referred to in footnote 1, discovery of address lists is an essential tool enabling private persons and groups and local governments to challenge the Bureau's population figures. Because of the fundamental constitutional and statutory rights involved,

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[1] Spanish Coalition, et al., v. Baldrige, C.A. No. 80C2004 (N.D. Ill.); Young v. Klutznick, 652 F.2d 617 (6th Cir. 1981) (brief amicus curiae filed Jan. 10, 1981); Carey v. Klutznick, __F.2d__ (2nd Cir. No. 81-6042, June 12, 1981) (brief amicus curiae filed Feb. 12, 1981).

MALDEF urges that the Court uphold the district court's disclosure orders in this case and in McNichols v. Baldrige, No. 80-1781.

MALDEF has also worked through its Census Awareness Project to promote the enumeration of all Hispanics in the United States on Census Day, including undocumented aliens. The importance of upholding strict confidentiality requirements for information furnished by individual respondents critically affects the accuracy of the census count of Hispanics, particularly in those communities where undocumented aliens reside. The Census Bureau is under the statutory obligation to assure respondents that their identities will not be disclosed and that the information they furnish will not be used against them. 13 U.S.C. §8(c). Undocumented aliens, who frequently avoid contact with government representatives, will be even less likely to cooperate with the census unless the prohibitions of 13 U.S.C. §9 against disclosure of individual identifying data are strictly enforced. Therefore, MALDEF also urges the Court to acknowledge the importance of maintaining confidentiality of

census information about individuals.

The Bureau should be permitted to disclose address lists and vacant unit lists, but only when the parties seeking disclosure are involved in formal efforts to challenge statistical population data published by the Bureau and only under strictly tailored protective orders which effectively prevent both disclosure of individual identifying material and unauthorized use or publication of any material. The use of adequate protective orders will uphold the confidentiality provisions of §9 as well as allow meaningful opportunity for the general population to assure an accurate census count. Disclosure of address lists and vacant unit lists under these conditions would serve the two interests of Hispanics identified in this Statement, and is fully consistent with the Census statutes.

ARGUMENT

The Census Confidentiality Statutes Can and Should Be Construed to Preserve the Important Concerns of Accuracy in Enumeration and Confidentiality of Respondent Information. A Correct Analysis of the Statutes Permits Disclosure of Address Lists in This Case.

The legal issue presented in this case is closely related to that before the Court in McNichols v. Baldrige, O.T. 1980 No. 80-1781, cert. granted (June 15, 1981). Although the case at bar originated as a request under the Freedom of Information Act (FOIA), 5 U.S.C. §552, and while McNichols is an action to compel re-examination of the Census Bureau's determination of vacancy rates in Denver, amicus believes that the same legal principles control both cases. In each, the issue turns on the interpretation to be given to the census confidentiality statute, 13 U.S.C. §9(a).

Amicus has stated its position in a brief submitted to this Court in McNichols, supra, and we will not repeat our entire argument here. In that brief, we acknowledge the great importance both of the confidentiality of individual census respondent information and of limited access to census data for purposes of verifying and correcting

undercounts like those alleged to have occurred in Essex County.[2] We submit that both of these interests can be safeguarded by a reading of 13 U.S.C. §9(a) which allows undercount litigants, or others who challenge the accuracy of census data in formal proceedings, limited access to census information including statistical summaries and lists but excluding material which identifies census respondents or provides individual information about them.[3] Any such access should be circumscribed to eliminate individual respondent information and should assure that there will be no unauthorized dissemination of any information.[4]

In our view, the correct reading of 13 U.S.C. §9 is that of Judge Stewart in his opinion concurring in the Second Circuit's judgment in Carey v. Klutznick, __F.2d__(2nd Cir. No. 81-6042, June 12, 1981). His balanced interpretation of the

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[2]Brief of MALDEF as amicus curiae in McNichols v. Baldrige, No. 80-1781, submitted August 4, 1981, at 4-9.

[3]Id. at 9-13.

[4]Id. at 15-16.

statutory provisions is faithful to the Congressional intent and serves the important and somewhat competing interests of confidentiality and accurate enumeration.[5]

As applied to this case, Judge Stewart's correct analysis of the statutory materials requires affirmance. The District Court was at pains to assure that no individual identifying material would be disclosed. Pet. for Certiorari, App. 10a, 14a-15a; and required that an oath of nondisclosure be administered to any person granted access to statistical information under its judgment. Id. at 17a. The Third Circuit properly affirmed that judgment. Its ruling should in turn be affirmed.

Conclusion

For the reasons stated in MALDEF's amicus curiae brief filed in McNichols v. Baldrige, supra, the judgment should be affirmed.

DATED: September 2, 1981

Respectfully submitted,

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[5] Id. at 10-13.

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DANIEL B. LEVINE, Acting Director,
Bureau of the Census,

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v.

PETER SHAPIRO, Essex County Executive,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF OF AMICI CURIAE, THE STATE OF NEW YORK, THE CITY OF NEW YORK, GOVERNOR HUGH L. CAREY, MAYOR EDWARD I. KOCH, *et al.*

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BRIEF OF AMICI CURIAE, THE STATE OF NEW YORK, THE CITY OF NEW YORK, GOVERNOR HUGH L. CAREY, MAYOR EDWARD I. KOCH, *et al.*

PRELIMINARY STATEMENT

Amici are plaintiffs in an action pending against the Census Bureau which seeks redress of the serious constitutional injury

plaintiffs will suffer if the huge undercount of the New York population that occurred in the 1980 Census is not corrected.[1] *Carey v. Klutznick*, 508 F. Supp. 404; 508 F. Supp. 416 (S.D.N.Y. 1980), *aff'd*, 637 F.2d 834 (2d Cir. 1980); 508 F. Supp. 420, *rev'd and remanded*, No. 81-6042 (2d Cir. June 12, 1981), *petitions for rehearing filed* July 24, 1981. Utilizing the most extensive factual record of any of the cases arising out of the 1980 Census, we present this brief in opposition to the position taken by the Census Bureau in *Baldrige v. Shapiro*, No. 80-1436, and *McNichols v. Baldrige*, No. 80-1781, that certain census documents are absolutely immune from disclosure.[2]

INTEREST OF AMICI CURIAE

Before this Court are two cases which present, in two somewhat different procedural contexts, the Government's claim that certain Census Bureau documents—specifically, lists of purportedly vacant housing units and address registers—are absolutely privileged from disclosure under the Census Act. The Government makes this claim despite the absence of any support in the language of the Census Act, despite the importance of the documents to the vindication of fundamental constitutional rights, and despite the availability of protective measures derived from the Census Act itself as well as the

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[1] Amici are the State and City of New York, their Governor and Mayor and eight voters from Congressional districts where census undercounting will result in particularly severe malapportionment.

[2] Because the Amici include eight non-governmental parties, they have obtained the consent of both petitioners and respondent in *Baldrige v. Shapiro* to the filing of this brief. Those consents have been filed with the Clerk of the Court pursuant to Supreme Court Rule 36. By the Court's order of August 28, 1981, *McNichols v. Baldrige* was consolidated with *Baldrige v. Shapiro* for purposes of oral argument. Although the Amici's case is closer on its facts to *McNichols*, Amici did not file a brief in support of the petitioners in that case because, as indicated below, until the Government's decision to seek rehearing in the Second Circuit in *Carey v. Klutznick*, Amici expected to file their own petition for certiorari. Since *Shapiro* and *McNichols* have been consolidated, we understand that this brief will be read in both cases and have captioned it accordingly.

Federal Rules of Civil Procedure which fully safeguard any legitimate concern for census confidentiality.

Amici commenced their action to compel the Census Bureau to correct an undercount in the State of New York. After trial on the merits, the district court found that there had been a disproportionately large undercount of the New York population, citing "conservative estimates" of that undercount which ranged from 750,000 to 900,000 people. *Carey v. Klutznick, supra,* 508 F. Supp. at 426-28, 433. An undercount of that magnitude would deprive New York State of at least one seat in the House of Representatives to which it is entitled. Moreover, since the undercount is disproportionately large among Blacks, Hispanics, aliens and the urban poor—groups that constitute a disproportionately large portion of New York's population—this undercount will result in a particularly injurious undercount of New York and, particularly, New York City. *Id.* at 426-27.

The Second Circuit affirmed the district court's preliminary injunction against the Census Bureau, *Carey v. Klutznick,* 637 F.2d 834 (2d Cir.), *aff'g,* 508 F. Supp. 416 (S.D.N.Y. 1980).[3]

[3] To remedy the undercount in New York, Amici sought both preliminary injunctive relief designed to insure that the census figures derived from the Bureau's then ongoing enumeration activities were as accurate as possible, and final injunctive relief requiring the Bureau to adjust the population totals statistically to correct for the racially and socioeconomically based undercount that cannot be eliminated through the Bureau's enumeration activities.

In October 1980, the district court granted Amici's motion for preliminary relief, ordering the Bureau to (1) process its own forms submitted by uncounted people after the Bureau's arbitrary deadline; (2) compare with census records a computerized file of New York City public assistance recipients prepared by the City; and (3) report the number of previously uncounted persons discovered by these means, and include them in the census. *See Carey v. Klutznick,* 508 F. Supp. 416 (S.D.N.Y. 1980).

The Bureau simply ignored the order for six weeks until, under threat of contempt, it appealed. On December 15, the Second Circuit affirmed the preliminary injunction in all respects. *Carey v. Klutznick,* 637 F.2d 834 (2d Cir. 1980). Only after its motions for a stay and rehearing were denied on December 29 did the Bureau even partially comply, while continuing to argue that checking the public assistance file would reveal no significant undercount because "redundant"

However, on the Government's subsequent appeal from the district court's final judgment after trial in favor of Amici, a different panel reversed and remanded for a new trial.[4] Both the Government and Amici have sought rehearing or rehearing en banc of that decision.

The basis for the Second Circuit's reversal was a discovery order requiring production of the same types of census documents as are involved here. Prior to trial, Amici requested, pursuant to Fed. R. Civ. P. 34, production of census documents which either show, or make it possible to show, which New York housing units had been counted, which missed, and which inaccurately classified as "vacant". This information is contained on the address registers, on forms indicating which units have been classified as vacant ("D-160") and on lists compiling D-160 forms. Except for individual census questionnaires, which Amici did not request, no other documents contain this information.

Prior to entry of its discovery order, the district court heard substantial evidence, described below, of the importance and relevance of the documents to Amici's claims. However, despite the conceded relevance of these documents, the Bureau refused to produce them, claiming they were absolutely privileged under 13 U.S.C. § 9(a). The district court disagreed and ordered their production subject to broad protective provisions designed to safeguard all legitimate concern for census con-

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census procedures had cured all the problems which Amici's proof had established. Yet, when the Bureau did partially comply, that compliance produced dramatic confirmation of a substantial New York undercount. Although the Bureau used checking procedures which understated the magnitude of the undercount, the Bureau found, nonetheless, that 8.5% of the people on the New York City public assistance list had not been counted. Report of the U.S. Bureau of the Census in Response to the Judgment of the Court entered December 29, 1980, at 3, 6, filed January 21, 1981, in *Carey v. Klutznick*, 80 Civ. 4550 (S.D.N.Y. December 22, 1980).

[4] *Carey v. Klutznick*, No. 81-6042 (2d Cir. June 12, 1981), *rev'g* 508 F. Supp. 420 (S.D.N.Y. 1980). This second and as yet unreported decision of the court of appeals is attached as an appendix to this brief.

fidentiality. The order allowed redaction of names of census respondents to protect their privacy, prohibited use of the materials for any purpose other than to help ensure an accurate census count, and required that anyone given access to the materials be sworn to confidentiality as specifically contemplated in 13 U.S.C. § 23(c).

Despite these protections, the Bureau refused to comply and unsuccessfully attempted an interlocutory appeal from the discovery order.[5] Thereafter, the district court was left with no choice but to find that "defendants have knowingly and wilfully placed themselves in contempt". Taking guidance from an earlier Second Circuit opinion regarding the proper sanctions for contempt by public officials,[6] it entered a carefully framed preclusion order under Fed. R. Civ. P. 37.

On appeal from the final judgment, the Bureau challenged both the discovery and preclusion orders (greatly exaggerating the effect the preclusion order had at trial). The preclusion order did not, in fact, affect the proof, or the Bureau's ability to rebut the proof, supporting the district court's essential findings that New York had been disproportionately undercounted and that statistical adjustment techniques to correct that undercount were feasible. As to these statistical and demographic issues, the Bureau was not precluded.

A divided panel of the Second Circuit reversed and remanded for a new trial. The majority opinion supported that disposition on two alternative theories. First, in a holding which is directly at issue in the cases presently before this Court, the Second Circuit held that the district court's discovery order was improvidently granted in light of the confidentiality provi-

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[5] The district court had stayed its order and granted the Bureau's request for a 28 U.S.C § 1292(b) certificate. That certification, as well as the Bureau's request for review by mandamus and under *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949), was rejected by the Second Circuit. Although the Bureau's Director then claimed he would not comply unless ordered by this Court to do so, the Bureau sought neither a stay nor other review from this Court.

[6] *In re Attorney General*, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979).

sion of 13 U.S.C. §9. The majority reached that conclusion without analysis of the statute, of the extensive factual record below establishing the importance of the census documents to the issues, or of the countervailing constitutional rights at stake. Rather, the majority, noting a conflict between the Third and Tenth Circuits, merely stated that it agreed with the holding in *McNichols v. Klutznick*, 644 F.2d 844 (10th Cir. 1981), *cert. granted sub nom. McNichols v. Baldrige*, 49 U.S.L.W. 3931 (June 15, 1981), that the documents are absolutely immune from discovery. *Carey v. Klutznick*, No. 81-6042 (2d Cir. June 12, 1981), slip. op. at 3727.

Alternatively, the Second Circuit held that even if the discovery order was proper, the preclusion order had prevented a full and fair disclosure of the facts, and thus was a reversible abuse of discretion. The irony of this holding—that the preclusion order, rather than the Government's contempt of a proper discovery order, prevented a fair trial—apparently eluded the court. Having disposed of the case on procedural grounds, the court never reached the merits of the trial court's ultimate finding that there had been a disproportionate undercount in New York and ignored Amici's demonstration that the preclusion order as applied at trial did not affect that finding.

Amici had hoped by now to have filed a petition for certiorari to review the Second Circuit's June 12 decision which would seek consideration with *McNichols* and *Shapiro* of the discovery issue, with the consequent benefit, *inter alia*, of placing before the court the most extensive record available on both the importance of the documents and the erosion of Constitutional rights threatened by the Bureau's adamant opposition to any judicial remedy for the undercount problem. However, the Government obtained an extension in the Second Circuit to decide whether to seek rehearing and then did so.[7] Since the Second Circuit has yet to act on the pending rehearing

[7] Since the Government had announced its intent to seek rehearing, Amici did so also, although stating our continued belief that the interests of justice would be better served if the broad census issues came to this Court more promptly.

petitions, Amici's position regarding the Government's claim of absolute privilege is presented in this brief.[7A]

We urge here that the absolute privilege claimed by the Census Bureau against discovery in all circumstances of the documents in issue is unwarranted by the Census Act, particularly in light of their importance to the vindication of paramount constitutional rights. We do not address the more limited issues raised under the Freedom of Information Act.

SUMMARY OF ARGUMENT

The 1980 Census cases present issues of fundamental constitutional importance. At stake is the constitutional guarantee of "equal representation for equal numbers of people". That guarantee is threatened because the Census Bureau, in its conduct of the 1980 Census, which will serve as the basis for legislative reapportionment throughout the coming decade, failed to count substantial numbers of people in various areas of the country.

Seeking to establish the existence and magnitude of this census "undercount" and obtain relief from the unconstitutional dilution of voting rights that it threatens, litigants in the various census actions have requested disclosure of census documents which show which housing units were counted, which missed, and which erroneously classified by the Census Bureau as vacant when they were in fact occupied. These documents are concededly vital to an accurate census count and to obtaining full relief.

Despite the conceded relevance and importance of these documents to the vindication of constitutional rights, the Bureau attempts to invoke the Census Act as an absolute bar to disclosure. However, the Bureau's statutory claim is without merit. The Census Act does not create a privilege from disclosure for the documents at issue here. And even if the Act is stretched to cover the documents, any privilege it creates is a

[7A] On September 10, 1981, after this brief had been set in page proofs, the Second Circuit denied the petitions for rehearing.

qualified one which is overcome by the great need for the evidence in the census suits, by the importance of the rights at stake, and by the ability of the court fully to protect legitimate confidentiality interests by fashioning appropriate protective orders.

ARGUMENT

I. THE BUREAU'S CLAIM OF ABSOLUTE PRIVILEGE IS INCONSISTENT WITH THE PROTECTION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The question whether the census documents at issue here are absolutely immune from disclosure to litigants injured by serious errors and omissions in the census can be properly considered only in the context of the fundamental constitutional rights at stake, the causes of census undercounting and the admittedly close relationship between the withheld documents and the nature and extent of the undercount.

A. The Importance of the Documents.

1. *The Roots of the Undercount Problem.* The discovery issue presented by the 1980 Census litigation has its roots in the history of the Bureau's failure to count minorities and the discovery in 1970 of great problems with respect to the Bureau's classification of occupied housing units as vacant.

First, as the Bureau admits, there has been a long history of undercounting this nation's minorities and thus undermining their right to vote.[8] Thus, for example, in the 1970 Census there

[8] In virtually every census in our history an undercount has occurred, and minorities have invariably been missed at rates far exceeding those for Whites—often by as much as ten times. H. Alterman, *Counting People* 262-63 (1969). In early census-taking, Blacks were treated in an overtly discriminatory fashion, and, in the opinion of a census historian, "The earliest censuses established precedents whose effects [on Blacks] may not yet have entirely disappeared." *Id.* at 267. Since 1950, when modern techniques were first applied to measure the undercount, its size and disproportionate impact have been more precisely known. Thus, the undercount, according to the Bureau's "preferred" estimates, was about 5.1 million in 1950, 5 million in 1960, and 5.3 million in 1970. Even more

was at least a 7.7% undercount of this nation's Blacks but only a 1.4% undercount of Whites. Moreover, despite efforts to decrease the racial undercount disparity, the Bureau now believes that in the 1980 census the disparity between the rates of Black and White undercounting has increased.[9]

Second, the 1970 undercount would have been substantially greater but for the Bureau's treatment of one of the classes of addresses at issue in these cases—purportedly vacant housing units. After the 1970 count was completed, the Bureau discovered that census enumerators had frequently classified occupied units as vacant. To correct that error, the Bureau used statistical sampling techniques to "impute" over 1 million people to the census rolls. Altogether through such statistical techniques (including some used only in selected Southern

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important than the size of the undercount is the continuing fact that it is not uniform among racial or socioeconomic groups. Thus, for example, as the Bureau concedes, the undercount was at least four times greater for Blacks (and Hispanics) than for Whites in 1950, 1960 and 1970.

[9] In fact, the Bureau's preliminary studies suggest that in 1980 there was actually an overcount of the white population while Black females were missed at a rate of 2.1% and Black males at a rate of 7.5%. Siegel, J.S., Passel, J.S., and Robinson, J.G., *Coverage of the National Population by Age, Sex and Race in the 1980 Census: Preliminary Estimates by Demographic Analysis,* unpublished Census Bureau memorandum, May 1981.

Throughout this litigation, the Bureau has frequently asserted that no judicial relief is warranted because in 1980 the undercount has been eliminated. This disingenuous claim is based on the Bureau's preferred estimate of between zero and 0.4% for the "measured" "net" national undercount in 1980. However, this national estimate is a net rate: gross undercounting less gross overcounting. As the district court in *Carey v. Klutznick* correctly found, moreover, it does not mean that some subnational areas—like the State of New York—were not substantially undercounted. 508 F. Supp. at 427. In fact, it is strong evidence that New York was substantially, disproportionately, undercounted. Given the undercount rates in New York—suggested by Amici's proof at trial and the Bureau's own study to be on the order of 6-10%—for the net national rate to be near zero, many other areas must have had either a negligible net undercount or a net overcount. The unconstitutional dilution of Amici's voting rights is thus clear.

states) the Bureau added some 4 million persons to the census totals in 1970.[10]

2. *The False Vacancy Problem.* In the New York case, Bureau employees testified that in the 1980 New York enumeration, numerous housing units, particularly in minority areas, had been listed as vacant when they were in fact occupied. The Bureau's supervisor for the Harlem area admitted that false vacancies had been tolerated by supervisory personnel "right on up the line". Similarly, the Bureau's senior officials conceded that the Bureau's piece rate pay system frequently caused enumerators to "curbstone"—the Bureau's own term for intentional falsification by enumerators which results in an undercount of the population.[11]

3. *The Mailing Address Problem.* The false vacancy problem does not arise until the second major stage of the census process when, after the initial mailout and mailback of census questionnaires, the Bureau's temporary employees attempt to enumerate the occupants of (or record as vacant) all units on the Bureau's basic address register which have not returned a census questionnaire by mail. This follow-up phase involving field work was overburdened in New York because the mail return rate of census questionnaires in New York was far below the national average of 85%. Indeed, the Bureau admitted that in minority areas in New York City the mail return rates ranged substantially below 50%. Thus, in New York as a whole, and particularly in such minority areas, there

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[10] In Amici's action, the Bureau took the position that it was barred by the Constitution and the Census Act from making the sort of statistical adjustments that it had used in 1970 to improve the accuracy of its count. The lower courts rejected this position. *Carey v. Klutznick*, 508 F. Supp. 404, 414-15 (S.D.N.Y. 1980); *see Carey v. Klutznick*, 637 F.2d 834, 837 (2d Cir. 1980).

[11] The pay system rewards enumerators almost as much for falsely recording a unit as vacant (which takes a few seconds) as for taking the time, trouble and risk of visiting an often dangerous area and attempting to count and obtain the demographic characteristics of all the people in an apartment unit. Moreover, the pay for falsely recording a unit as having only a single occupant is equal to that for correctly enumerating a family of many persons.

was a substantially greater opportunity for housing units to be falsely classified as vacant.

But that was not the only difficulty tied to the documents at issue. It also developed that there were substantial deficiencies in the Bureau's basic address register itself. *See Carey v. Klutznick*, 637 F.2d 834, 836 (2d Cir. 1980).

The Bureau's address register was compiled from address lists purchased from commercial sources. Based on admissions of Bureau employees, census documents and reports of the General Accounting Office, Amici, both prior to the discovery order and in greater detail thereafter, showed that the address registers used for mailing and subsequent enumeration for New York were woefully incomplete. For example, the president of the mail list company that supplied the purchased lists for New York testified that his firm had probably not mailed anything to the South Bronx for 10 years. Postal workers estimated, moreover, that the lists that were purchased for New York were from 4 to 10 years old on average. The Bureau itself estimated that the coverage of its initial mailing list for New York City was less than 60%.

Naturally, there were efforts by the Bureau to attempt to improve the quality of the initial lists. However, the Bureau's own precensus analysis of these measures conceded that the "better the initial list, the better the later correction operations will work". Moreover, as demonstrated by affidavits from Bureau employees submitted on behalf of Amici prior to the discovery order, there was substantial evidence that these operations had been incomplete and in some cases simply abandoned.[12]

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[12] That proof was further developed at trial, *see* 508 F. Supp. at 424, along with substantial other proof of conduct that led to undercounting.

That other proof, summarized by the district court at 508 F. Supp. at 423-26, overwhelmingly supports the court's findings that "the Bureau's conduct [of the census in New York] was on the whole unreasonable and at times irrational", *id.* at 430-31, and that this "mismanagement" of census operations contributed to the undercount, *id.* at 433.

In sum, the record in *Carey v. Klutznick* clearly established that deficiencies and errors in the address lists and erroneous designations on the vacant housing lists were major causes of census undercounting. The relevance and importance of the withheld documents to establishing the exact magnitude of the undercount is equally clear. What is more, the Bureau admits as much.

4. *The Admissions by Top Bureau Officials that the Withheld Documents Were Vital To Determining the Accuracy of the Census Count.* Prior to entry of the order requiring the Census Bureau to turn over its address and vacant housing lists to plaintiffs in *Carey v. Klutznick*, the district court ordered the deposition of George E. Hall, the associate director of the Bureau responsible for the decennial census. Mr. Hall testified that the address register "is the basic document controlling" the entire census process, both in the district offices and in the field.

This confirmed the prior testimony of the Bureau's New York Regional Director, William F. Hill. Indeed, Mr. Hill emphatically testified that the very "documents which should be reviewed" to determine whether census "problems . . . have been solved" are the address registers. According to Hill, the address registers are the only documents that contain that information:

"Q Are you telling me that there are no more substantive documents between—those [address registers] are highly detailed documents that you're talking about? Right?

"A Yes. Sure.

"Q There have been problems called to your attention in the past which you want to make sure are settled before you finish your job here, right?

"A Yes.

"Q I take it you're not telling me the way to go and identify those problems is to go look at the address register.

"A No, that's what I am telling you.

"Q You're telling me—

"A I'm telling you—

"Q Let me ask the question differently. Are you telling me there are no substantive documents which comment upon problems in the New York region?

"A In a context of what you asked me about things that have been identified previously or whatever and what we're doing about it, the answer is basically no, there aren't."

The utility of the address registers—and most particularly lists of vacant housing units—in locating and correcting census omissions was further confirmed by the Bureau's own conduct in New York. In July 1980, preliminary population and housing figures were provided to officials of the City of Peekskill, New York. Because the Bureau's figures showed fewer housing units than the city had projected, the city challenged the census totals. In response to the challenge, and contrary to the Bureau's current claim of an absolute statutory prohibition against disclosure, a census official took the address registers for several enumeration districts to the offices of Peekskill's City Planning Commission, where local officials used the registers to compile a list of housing units which had been classified in the address registers as vacant or non-existent. According to an unchallenged affidavit of the responsible Peekskill official,[13] a field check of the listed addresses subsequently revealed that over 70% (34 of 47) of the units in a single enumeration district that the Bureau had classified as vacant were in fact occupied.

This incident serves to emphasize (i) the Bureau's own belief, as confirmed by its Regional Director, that vacancy lists and address registers are the primary means of detecting false vacancies and other census errors; (ii) that localities, through the use of information contained in the withheld documents, are

[13] It also appears that address registers were disclosed to city officials of Detroit. *See* Affidavit of Patricia Cousens Becker, head of Data Coordination Planning Department of the City of Detroit, annexed as Appendix B to this brief.

capable of discovering errors in the counting process which would go undetected, or undisclosed after detection, by the Bureau; and (iii) that the Bureau itself has selectively revealed the documents to local officials, despite the claim it now makes that such disclosure is absolutely prohibited by the Census Act.

B. The Constitutional Rights and Duties at Stake.

While the precise question presented by these cases is a narrow one—whether census address and vacancy lists are immune from disclosure to litigants challenging the accuracy of the census—the ramifications of these and similar actions are of profound constitutional importance. The decennial census is central to the allocation of political rights under the Constitution. On the census rest (1) the Great Compromise between the original states, large and small; (2) the direct election of the House of Representatives "by the people of the several States" (U.S. CONST. art. I, § 2) with representatives apportioned among the states "according to their respective numbers" based on a census which is to count "the whole number of persons in each state" (U.S. CONST. amend. XIV, § 2); (3) the allocation of votes in the Electoral College (U.S. CONST. art. II, § 1); and ultimately (4) the constitutional guarantee of equal votes for equal numbers of people (see *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny). Given the vital role the decennial census plays in our system of government, Federal statutes providing for the taking of the census must be construed in a manner consistent with its constitutional purpose.

The Constitution requires that the census reflect, "as nearly as is practicable", the whole number of persons in each state. That is the sole constitutional function of the census and that high duty of accuracy flows from the constitutional purpose that the census serves, from the language of the Constitution, and from the decisions of this Court.

Article I, section 2, clause 3, of the Constitution, as amended by section 2 of the Fourteenth Amendment, provides in relevant part:

> "Representatives shall be apportioned among the several States according to their respective numbers, coun-

ting *the whole number of persons in each State,* excluding Indians not taxed." (Emphasis supplied.)

This formula was an integral part of the "Great Compromise" of the Constitutional Convention of 1787, under which independent states, large and small, agreed to surrender their sovereignty and form one nation. To effectuate the apportionment of Representatives among the States "according to their respective numbers", the Framers agreed that a census would be taken at regular intervals, pursuant to which reapportionment would occur. 1 *Records of the Federal Convention of 1787* at 579-80, 589-97 (Farrand ed. 1937). Thus, "[t]he direct and declared object of this census is, to furnish a standard by which 'representatives . . . may be apportioned among the several states' ". *Loughborough v. Blake,* 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.). The Fourteenth Amendment eliminated the requirement in Article I, section 2, that slaves should be counted as only three-fifths of a person. That change reinforced the substantive principle that the entire number of persons in each State is to be the basis of representation in the House. *See Cong. Globe,* 39th Cong., 1st Sess. 358-59 (remarks of Rep. Conkling), 141-42 (remarks of Rep. Blaine) (1866).

This Court's apportionment decisions further underscore the Census Bureau's constitutional duty of accuracy in its conduct of the decennial census. For example, in *Wesberry v. Sanders,* 376 U.S. 1 (1964), after recounting the history of the "Great Compromise", this Court affirmed that Article I, section 2 means that "*as nearly as is practicable* one man's vote in a congressional election is to be worth as much as another's". 376 U.S. at 7-8 (footnotes omitted) (emphasis supplied). The Court concluded that it is "our Constitution's plain objective [to make] equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us." 376 U.S. at 18.

Kirkpatrick v. Preisler, 394 U.S. 526 (1969), shows how "high" this standard is. There this Court held unconstitutional

an apportionment plan that allowed 2-3% population variances among congressional districts. The Court observed:

> "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. . . . Therefore, the command of Art. I § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 394 U.S. at 531.

Of course, for the guarantee of "equal representation for equal numbers of people" to be realized, in the first instance the census totals upon which apportionment is based must be "as nearly as is practicable" accurate. If they are not, fundamental voting rights are denied just as surely and unconstitutionally as by avoidable population variances between voting districts. *See Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) (the Constitution requires that "Congress be fairly apportioned, based on accurate census figures").

Like the plaintiffs in the various other census cases, Amici commenced their action when it became clear that the 1980 Census would fail by a substantial margin to count the whole number of people in New York. As noted above, Amici proved at trial that the 1980 undercount in New York was, by conservative estimate, as large as 900,000 people. *Carey v. Klutznick*, 508 F. Supp. 420, 428 (S.D.N.Y. 1980).

Despite an undercount of this magnitude, the Census Bureau consistently in *Carey* and in similar actions has argued, under various legal rubrics, that the Bureau's work is immune from judicial scrutiny. In considering the question of the discoverability of the vacancy and address lists, the Bureau's marked aversion to *any* scrutiny of its work should be kept in mind. Thus, not only does the Bureau claim that census documents that it says provide the best evidence of census errors and omissions are absolutely immune from disclosure,

but also it has repeatedly asserted the legal claims (1) that states, cities and voters lack standing to challenge census undercounting; (2) that census cases are not justiciable; (3) that the Constitution imposes on the Bureau no standard of accuracy whatsoever; and (4) that the decision as to whether or not even to try to do anything to correct the undercount is committed to the unreviewable discretion of the Bureau.[14] Moreover, it has refused to accept information from states and cities which would assist it in finding and correcting omissions, even when ordered to do so by the courts.[15] And, finally, it refuses to use known and reliable statistical methods to adjust erroneous census data to correct for undercounting.

The Bureau's defenses and conduct in these actions are all of a piece. The Bureau's position, in essence, is that however shoddy or irrational its work, however erroneous its count, and however grave the resultant injury to constitutional rights, the Federal courts are powerless to review its work and injured states, cities and voters have no remedy. Subversive as it is of constitutional government, the Bureau's position is plainly wrong.

II. THE CENSUS ACT DOES NOT PREVENT DISCLOSURE OF THE BUREAU'S VACANCY AND ADDRESS LISTS.

The provisions of the Census Act on which the Bureau bases its claims of privilege impose specific limitations on the Bureau's right to use, publish and distribute for a fee certain categories of census information, and prohibit the disclosure of census questionnaires. They do not create a privilege from disclosure for the vacancy and address lists at issue here. Moreover, even if the claimed privilege were broad enough to cover the withheld documents, the privilege would be a quali-

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[14] These legal defenses were properly rejected in *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y. 1980), *aff'd*, 637 F.2d 834, 838-39 (2d Cir. 1980).

[15] *See* p. 3 n.3, *supra*.

fied one, and is overridden by the census litigants' need for the documents and the importance of the constitutional rights asserted. And any legitimate confidentiality interest can be adequately safeguarded by an appropriate protective order.

A. Neither Section 9 nor Section 8(b) of the Census Act Applies to the Vacancy and Address Lists.

The Bureau invokes the confidentiality provisions of the Census Act, 13 U.S.C. § 9 (as well as a disclosure for pay provision of the Act, 13 U.S.C. § 8(b)), in support of its argument that its vacancy and address lists are absolutely immune from discovery. That position is flatly inconsistent with both the language and the purpose of the statute: section 9 by its terms does not apply to the materials sought here and, moreover, such materials are sought for the very purpose the statute is designed to attain—assurance of a complete and accurate census.

Section 9 provides that

> "(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purpose of this title, shall require for any reason copies of census reports which have been retained by any such

> establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individuals or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding."

Like other statutes limiting the disclosure of official information, section 9 must be strictly construed. *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961); *see* Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Col. L. Rev. 142 (1976). It may not be read to insulate the documents at issue from discovery absent a clear and conclusive expression that Congress intended that result. *Freeman v. Seligson*, 405 F.2d 1326, 1351 (D.C. Cir. 1968). As the court in *Freeman* stated:

> "The primary principle of according justice to litigants, dependent on ascertainment of underlying facts, is not to be subordinated to some other domestic policy as a matter of inference of Congressional intent from ambiguous or inconclusive references. . . . [I]n other instances where Congress has thought it necessary to protect against court use of records it has expressly so provided by specific language." 405 F.2d at 1351.[18]

None of the three subsections of section 9 may be read even by implication to limit the disclosure of the Bureau's vacancy and address lists—and much less so to "conclusively", "expressly" or by "specific language" limit their disclosure.

Subsection 9(a)(1) is inapplicable because it has nothing to do with disclosure, but merely limits the *uses* to which the

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[18] *See* Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Col. L. Rev. 142, 151 (1976): "The lesson of the foregoing [official information privilege] cases is that a significant rule of statutory construction has developed: statutes creating official information privilege are to be narrowly construed. Congress must use explicit, unmistakable statutory language if the judiciary is to find privilege."

Bureau may put census "information".[17] By prohibiting Bureau officials from "using" census information for "other than . . . statistical purposes", the provision prevents Bureau personnel, for example, from using their position for personal gain by selling census information to direct mail advertisers. Stretching subsection 9(a)(1)'s prohibition against the "use" of the data to bar the Bureau's compliance with a discovery request in an action challenging the accuracy of the census would violate a common sense, contextual reading of the provision.

Even if compliance with a discovery request in the present cases would constitute a "use" under subsection 9(a)(1), the lists of addresses and vacant units at issue here are sought to be used for a "statistical purpose" identical to the Bureau's: to ascertain whether all housing units have been counted correctly and whether those classified as "vacant" are in fact vacant, and thereby to obtain as complete an enumeration as is practicable. The district court's discovery order in *Carey v. Klutznick* limited Amici's use of the documents to precisely that purpose.[18] Moreover, if § 9(a)(1) barred disclosure as broadly as the Bureau contends, both subsections 9(a)(2) and (a)(3) would be superfluous.

Subsection 9(a)(2) prohibits "publication" of census "data" that could identify any respondent. No publication of

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[17] In addition, much of the information contained on the address lists was not "furnished" under the provisions of this title to the Bureau and thus does not fall within the protection of 13 U.S.C. § 9(a)(1) or (2). Clearly, addresses purchased from commercial vendors and supplemented by post office checks are not "furnished" to the Bureau by any respondents. The Bureau tries to expand the protection of sections 9(a)(1) and 9(a)(2) to include information "gathered" by the Bureau "in the course of enumerating the population". However, the sections protect only responses required of respondents by the Census Act and not information accumulated by the Bureau itself from commercial mailers, the post office or by observation of Bureau enumerators.

[18] The Bureau's extraordinarily broad reading of subsection 9(a)(1) is also inconsistent with its common sense behavior during the 1980 Census. For example, on many occasions during the 1980 Census, New York Regional Office employees instructed district office personnel to use the registers as mailing lists for recruitment of enumerators, clearly not a statistical purpose for which the information was furnished.

the lists has been sought or ordered. The Census Act itself, 13 U.S.C. § 302, recognizes the distinction between "publication" and the disclosure sought here.[19] Moreover, where, as in *Carey v. Klutznick*, disclosure is ordered pursuant to protective provisions requiring the redaction of names from the documents, subsection 9(a)(2) is inapplicable because there is no possibility that particular respondents could be identified.

Arguments attempting to convert a statutory prohibition against "publication" into a bar against disclosure have consistently been rejected by the courts. In *Rosee v. Chicago Board of Trade*, 35 F.R.D. 512 (N.D. Ill. 1964), the Secretary of Agriculture resisted the production of agency documents which reflected the trades and trading positions of numerous private individuals, arguing that Section 8 of the Commodity Exchange Act, 7 U.S.C. § 12 (1968) (amended 1978), prohibited disclosure. By its terms, the statute prohibited the "publication" of "data and information which would separately disclose the business transactions of any person and trade secrets or names of customers." In holding that section 8 did not prohibit the disclosure of the documents, the court explained:

> "While the section restricts the data which the Secretary of Agriculture may 'publish', its language would not appear to relate to disclosures pursuant to discovery proceedings under the Federal Rules of Civil Procedure and subject to supervision by the Court. Disclosure in these instances is not a publication. . . . Where Congress has intended to proscribe the use of government-held data in judicial proceedings, it has not talked in terms of 'publish' or 'publication'. Rather, it has expressed the prohibition explicitly."[20] 35 F.R.D. at 515.

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[19] Section 302 of the Act permits the Secretary to make rules "for such confidentiality, *publication*, or *disclosure*, of information collected hereunder as he may deem necessary. . . ." 13 U.S.C. § 302 (emphasis added). Thus, even if "publication" were prohibited by § 9(a)(2), "disclosure", which the Act itself distinguished from "publication", would not be prohibited.

[20] The court in *Rosee* (35 F.R.D. at 515) cited numerous examples of statutes which—in marked contrast to the Census Act—explicitly prohibit disclosure of data in judicial proceedings:

See Merchants National Bank and Trust Co. v. United States, 41 F.R.D. 266, 268 (D.N.D. 1966). Similarly, in *Freeman v. Seligson, supra*, the D.C. Circuit, relying on *Rosee*, ordered disclosure of agency documents which the Secretary of Agriculture claimed to be privileged under Section 8 of the Commodity Exchange Act. That court concluded:

> "[L]imited disclosure in judicial proceedings, carefully curtailed by judicious use of protective orders authorized by Rule 30 [now Fed. R. Civ. P. 26], is not a publishing barred by the section. . . . In the absence of a specific prohibition against disclosure in judicial proceedings, such as Congress set forth in some statutes, clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice. That kind of indication is not provided by § 8, where both the language used and the statutory setting plainly reflect Congressional concern with widespread dissemination of information not otherwise available to the public, and not with disclosure in judicial proceedings." 405 F.2d at 1348-49 (footnote omitted).

Subsection 9(a)(3) is also inapplicable to the vacancy and address lists because it protects only "individual reports"—i.e., census questionnaires. No plaintiff in a census case has sought to discover census questionnaires, and no district court has ordered them produced.

In addition to the confidentiality provisions of section 9, the Bureau seeks to invoke a *disclosure* provision of the Act, section 8(b), in aid of its confidentiality claims. Section 8(b) provides, in pertinent part:

> "Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary may furnish copies of

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Federal Aviation Act of 1958, § 701, 49 U.S.C. § 1441(e); Act of May 6, 1910, c. 208, § 4, 36 Stat. 351 (1910), 45 U.S.C. § 41 (railroad accident investigations); Act of August 10, 1956, c. 1041, 70A Stat. 748 (1956), 10 U.S.C. § 7724 (information regarding naval vessels); P.L. 85-857, September 2, 1958, 72 Stat. 1236 (1958), 38 U.S.C. § 3301 (information in Veterans' Administration records).

> tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys, for departments, agencies and establishments of the Federal Government, the government of the District of Columbia, the government of any possession or area (including political subdivisions thereof) . . . state or local agencies, or other public and private persons and agencies, upon payment of the actual or estimated cost of such work."

In arguing that section 8(b) bars disclosure to litigants of the sort of lists at issue here, the Bureau simply misreads the statute. Section 8(b) constitutes a *grant* of power enabling the Secretary of Commerce to make and furnish copies of certain tabulations, statistical materials, compilations and surveys to various public and private entities, and to do so for a fee. The subsection has no bearing on what information may be disclosed under compulsion of law. The restrictive language on which the Bureau relies is merely a limitation on the Secretary's power which, especially under the rigorous standards set forth in *Freeman, supra,* cannot be converted into a source of privilege to support the Bureau's refusal to disclose its vacancy and address lists.

Moreover, section 8(b) makes it even clearer that the Bureau's reading of section 9 is too broad. All the disclosures authorized by section 8(b) are expressly made "[s]ubject to the limitations contained in" section 9. Certain disclosures are subject to the additional requirement that they "not disclose the information reported by, or on behalf of, any particular respondent". If section 9 were as broad as the Bureau claims, that added requirement would be mere surplusage, a result that Congress cannot be presumed to have intended.

In addition to the plain meaning of the confidentiality provisions, both case law and legislative history demonstrate that defendants' privilege argument is much too broad. *St.*

Regis Paper Co. v. United States, supra, involved file copies of a company's census reports. Confidentiality under section 9 was asserted because the copies contained the same information that had been submitted to the Bureau in the original report. (At that time, section 9 was identical to the present version except that it did not explicitly protect *copies* of individual reports.) Requiring that section 9 be strictly construed, this Court held that only the actual report filed with the Bureau was confidential; the "information" contained in the report, and therefore the copy, was not privileged. 368 U.S. at 217-18. This Court rejected arguments which echo those made by the Bureau here that allowing disclosure of the information would "chill" responses to the Census and would contradict the "legend" of confidentiality appearing on the census forms, concluding that:

> "Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result. That this statute does not do." 368 U.S. at 218.

Following the *St. Regis* decision, Congress amended section 9 to make *copies* of individual reports retained by census respondents "immune from legal process". At that time, Congress considered rewriting section 9 to extend that privilege from disclosure to "information" and "data" contained in the reports,[21] but rejected that option in the face of opposition from all sides, including the Bureau itself.[22] The inclusion in section 9, as amended, of a "specific prohibition against disclosure in judicial proceedings", *Freeman, supra,* 405 F.2d at 1348, covering census questionnaires underscores the lack of any similar prohibition covering the documents at issue here.

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[21] *See H.R. Rep.* No. 10569, 87th Cong., 2d Sess. (1962), *printed in, Hearing Before the Comm. on Post Office and Civil Service,* Confidentiality of Census Reports, 87th Cong., 2d Sess. 10 (1962) (hereinafter "Hearings").

[22] *E.g.,* Letters from Bureau of the Budget, Federal Trade Commission, Justice Department, and Commerce Department, *Hearings* at 4-5, 8, 15-16, 26-27, 29.

In the only post-amendment case addressing the issue of confidentiality under section 9 in a relevant context,[23] the court examined the legislative history surrounding the 1962 amendment and stated:

> "The House Committee considering the amendment specifically rejected language that would have made census 'information, reports and other data' immune from legal process, thus clearly undermining appellants' assertion that Congress conferred such broad protection. *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 699 (D.C. Cir.) (per curiam), *cert. denied*, 439 U.S. 958 (1978).

B. Even If The Confidentiality Provisions of the Census Act Apply to the Documents At Issue, Those Provisions Merely Establish a Qualified Privilege Which is Outweighed by the Paramount Constitutional Interest in Disclosure Here.

Even if the language of section 9 were stretched to cover the vacancy and address lists at issue, the documents would still have to be disclosed under circumstances like those in *Carey v. Klutznick*. Courts that have considered the extent of privileges established by statutes like section 9 have consistently concluded that the privilege is not absolute, but qualified. As the United States Court of Appeals for the District of Columbia explained:

> "Determining that [allegedly privileged documents] are confidential reports is but a first, albeit important, step. The legal authorities which create the confidential report privilege divide into three categories. The first type

[23] The instant case is entirely different from *Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977), relied on heavily by the Bureau. In *Seymour*, the plaintiff sought disclosure under the Freedom of Information Act of the *names* and addresses of certain businesses—and did so for the purpose (inconsistent with subsection 9(a)(1)) of notifying potential class members of two antitrust actions. In that context, the Bureau's claim of privilege was properly sustained.

> expressly privileges documents from disclosure in judicial proceedings, and may result in a complete bar to discovery. The second type specifically provides that confidential reports must be furnished to a requesting court. The third, and largest category is composed of authorities such as those in issue here, which bar disclosure without specifying from whom they are to be withheld.
>
> "In our view, authorities of this third type create a qualified privilege . . . ."

Association for Women In Science v. Califano, 566 F.2d 339, 346 (D.C. Cir. 1977) (footnotes omitted); *see Freeman v. Seligson*, 405 F.2d 1326, 1339-40 (D.C. Cir. 1968); *Carr v. Monroe Manufacturing Co.*, 431 F.2d 384, 389 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

Since section 9 similarly fails to identify "from whom [confidential documents] are to be withheld", it falls within the third category, and any privilege it creates is merely a qualified one. Thus, in determining whether to compel disclosure, a court must balance the benefits which will flow from the disclosure of the vacancy and address lists against the potential harm of such disclosure. *Association for Women In Science, supra*, 566 F.2d at 346; *see Freeman, supra*, 405 F.2d at 1340; *Carr, supra*, 431 F.2d at 389. In performing this weighing process, the courts must remember that:

> "[t]he principle favoring full access . . . to relevant information, in the absence of strong competing considerations, is an important foundation for the achievement of justice . . . [and] clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice."

Association of Women In Science, supra, 566 F.2d at 346; *Freeman, supra*, 405 F.2d at 1348; *Carr, supra*, 431 F.2d at 390 ("The possibility of harm to an administrative program and the invasion of privacy of persons who seek employment cannot be

ignored. But in nearly every case involving similar state statutes, the balance has been struck in favor of disclosure in court proceedings.")

In the present cases, the balance weighs heavily in favor of disclosure. As detailed above, the vacancy and address lists at issue are extremely important in showing the magnitude of the census undercount. Especially in cases such as these involving alleged violations of fundamental constitutional rights, the interest of a government agency in preserving the confidentiality of its work must yield to the paramount interests of citizens seeking to vindicate those rights.

Furthermore, any potential harm which the Bureau might allege can be compensated for by the entry of appropriate protective orders. In *Freeman v. Seligson, supra,* the Secretary of Agriculture attempted to establish a qualified privilege for government documents on the basis of hypothetical injuries that might have resulted from their disclosure—much like the Bureau's allegations in the instant cases. In ordering disclosure, the court explained:

> "There is no reason why the court cannot also ensure that this information is not released by appellee. The courts routinely handle situations where litigation discovery trenches on competitors' rights to secrecy by using their powers under Rule 30 [now Rule 26]. The courts can limit, and in actual practice do limit, the persons having access to information, their freedom to discuss the information to which they are given access, and the uses to which the information may be put. No great outcry has arisen that information thus restricted has been leaked, or put to improper uses, by attorneys who are sworn officers of the court." 405 F.2d at 1550.

See Carr v. Monroe Manufacturing Co., 431 F.2d 384, 390 (5th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971).

In *Carey v. Klutznick,* for example, the district court's discovery order protected against any harmful consequences which could reasonably be claimed to result from disclosure to

counsel of the vacancy and address lists. As suggested in *Freeman*, the court "limit[ed] the persons having access to information, their freedom to discuss the information, and the uses to which the information may be put". The discovery order limited the use of the documents to "helping to ensure an accurate count of the whole number of persons in New York in the decennial census", banned disclosure of the documents except as necessary to achieve that purpose, and required redaction of names from the documents. Finally, the order included a direction that

> "any person granted access to the documents produced pursuant to this Order shall be sworn to confidentiality pursuant to 13 U.S.C. § 23(c)".

Section 23(c) of the Census Act provides:

> "The Secretary may utilize temporary staff, including employees of Federal, State or local agencies or instrumentalities, and employees of private organizations to assist the Bureau in performing the work authorized by this title, but only if such temporary staff is sworn to observe the limitations imposed by section 9 of this title."

This section specifically authorizes utilization of local officials who, pursuant to the order, would be "performing the work authorized" by Title 13—helping ensure that all persons in their localities are counted.[24] Therefore, the confidentiality interests of the Bureau were adequately protected by the protective order entered in *Carey v. Klutznick* and such interests can be protected in other census cases by the entry of a similar order.

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[24] The Bureau's argument that the district court's order that state and local employees be sworn to confidentiality indicates that the address lists fall within the scope of Section 9 is completely without merit. The protective order formulated by the district court carefully limited the terms of the disclosure to ensure that none of the limitations on census information delineated in Section 9 were violated. Imposition of additional safeguards hardly indicates that but for the oaths the provisions of Section 9 would have been violated.

The absolute privilege with which the Bureau seeks to cloak its vacancy and address lists is thus a chimera. The statutes simply do not support it. The Bureau's own treatment of the withheld documents belies it. The importance of the documents to the litigants, and the importance of the constitutional rights at stake in the census cases, mandate that whatever privilege exists—and none does—be subordinated to the paramount interest of the litigants in the documents' disclosure. The Bureau's asserted interest in maintaining the "integrity of census data" is hardly sufficient to raise a privilege where none exists, and is safeguarded in any case by the judicious use of protective orders. If that protection is insufficient, the Bureau's appeal must be to the Congress and not to the courts. Under the existing statutory scheme, as much as the Bureau would have it otherwise, vacancy and address lists are not among the documents the Bureau is privileged to withhold from litigants seeking to test the accuracy of the census.

CONCLUSION

The Bureau of the Census should be required to produce its vacancy and address lists as necessary to subject challenged census results to review by the courts.

September 11, 1981

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 947—September Term, 1980

(Argued February 20, 1981 Decided June 12, 1981)

Docket No. 81-6042

HUGH L. CAREY, et al.,

Plaintiffs-Appellees,

—v.—

PHILIP M. KLUTZNICK, et al.,

Defendants-Appellants.

Before:

VAN GRAAFEILAND and MESKILL, *Circuit Judges,*
and STEWART, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York following a nonjury trial before Werker, *J.*, which directed the Census

* Of the Southern District of New York, sitting by designation.

Bureau to adjust population figures for the State and City of New York. Reversed and remanded for a new trial.

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VAN GRAAFEILAND, *Citcuit Judge:*

When the first federal census was conducted in 1790, the total population of the United States was less than 4,000,000.[1] New York City, the country's largest municipality, had only 33,000 inhabitants.[2] Despite these relatively small numbers, the census, which was conducted by United States Marshals, did not go smoothly. Transportation and communication were inadequate.[3] Boundaries of towns and cities were often undefined.[4] Cooperation by the citizenry was less than complete. Some people distrusted the newly-formed federal government; others were

1 C. Wright & W. Hunt, *The History and Growth of the United States Census* 17 (1900).

2 U.S. Dep't of Commerce, *The Story of the Census, 1790-1916* 8 (1916).

3 *Id.*

4 *Id.* at 9.

influenced by a fear of increased taxation; many opposed the basic concept of a census.[5]

Because art. 1, § 2, cl. 3 of the then newly-enacted Constitution provided that members of the House of Representatives and direct taxes should be apportioned among the States according to population, it had been anticipated that the census would provide an accurate count. A State's temptation to exaggerate its population count for purposes of congressional representation would be offset by its desire to reduce its apportioned share of direct taxes.[6] However, when the census was finally completed in 1791, there was a fairly wide-spread belief that it had resulted in a substantial undercount.[7]

Although the mechanics of the counting process have been improved in each of the nineteen ensuing censuses, there has never been a perfect count.[8] This is concededly true of the 1980 census. In keeping with the spirit of the times, States and municipalities in various parts of the country are seeking to remedy this most recent imperfection through litigation.[9] Approximately fifty lawsuits have been brought by or on behalf of subordinate govern-

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5 *Id.*

6 C. Wright & W. Hunt, *supra* note 1, at 13 n.a.

7 *Id.* at 16; The Special Committee on Empirical Data in Legal Decision Making, "The Undercount of the Census", 36 *The Rec. of the Ass'n of the Bar of the City of New York* 24 (1981).

8 *Gaffney v. Cummings*, 412 U.S. 735, 745 n.10 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 539 n.3 (1969) (Fortas, *J.*, concurring).

9 The deterrent effect of direct tax apportionment on State claims of undercount has, of course, been eliminated by the passage of the Sixteenth Amendment.

ment bodies, in each of which the claim of a substantial local or regional undercount is made.[10]

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10 The inundating effect of this spate of litigation can perhaps best be demonstrated by simply listing the cases involved: *Goodman v. Klutznick*, No. 81-70193 (E.D. Mich.); *Dona Ana County v. Klutznick*, Civ. No. 80-676 M (D.N.M.); *Del Bello v. Klutznick*, No. 80 Civ. 7195 (S.D.N.Y.); *Board of Commissioners v. Klutznick*, No. C-1-81-029 (S.D. Ohio); *Overstreet v. Baldridge*, No. J-81-0007-Civ. (D. Alas.); *Cole v. Klutznick*, No. 81-0049-P.G. (D.P.R.); *Fahy v. Klutznick*, No. 81-617 (D.N.J.); *Sharrow v. Reagan*, No. 81 Civ. 1953 (S.D.N.Y.); *Connell v. Baldridge*, No. Civ. 81-5029-CV-SW (W.D. Mo.); *Meyers v. Baldridge*, No. B-8161-CA (E.D. Tex.); *Munzert v. Baldridge*, No. 80-5369 (S.D. Ill.); *Louisiana v. Klutznick*, No. 81-004-A (M.D. La.); *Spanish Coalition for Jobs v. Klutznick*, No. 80 C 2994 (N.D. Ill.); *New Jersey Apportionment Commission v. Department of Commerce*, No. 81-309 (D.N.J.); *Clark v. Klutznick*, No. 80-4153 (D.N.J.); *City of Hobbs v. Klutznick*, No. 80-792 (D.N.M.); *Sullivan v. Klutznick*, No. A-80-397-Civ. (D.Alas.); *McLaughlin v. Klutznick*, No. 81-7 (D. Del.); *City of College Park v. Klutznick*, No. C-80-2252-A (N.D. Ga.); *City of East Point v. Klutznick*, No. C-80-2227-A (N.D. Ga.); *Hatcher v. Klutznick*, No. H-80-742 (N.D. Ind.); *Conway v. Klutznick*, No. 80-1549-C(3) (E.D. Mo.); *Krodinger v. Klutznick*, No. 80-1636-C(1) (E.D.Mo.); *DeFino v. Klutznick*, No. 80-3896 (D.N.J.); *Gibson v. Klutznick*, No. 80-3438 (D.N.J.); *Jasienski v. Klutznick*, No. 80-4142 (D.N.J.); *New Mexico v. Klutznick*, No. 80-0726-C (D.N.M.); *Lewis v. Klutznick*, No. 80-862-Civ-5 (E.D.N.C.); *Red Lake Bank of Chippewa Indians v. Klutznick*, No. 6 80-644 (D. Minn.); *Drakeford v. Klutznick*, No. C-80-645D (M.D.N.C.); *Padilla v. Klutznick*, No. 80-2570 (D.P.R.); *City of Willacoochee v. Baldridge*, No. CV 581-05 (S.D. Ga.); *City of Terre Haute v. Klutznick*, No. TH 80-242-C (S.D. Ind., dismissed Jan. 29, 1981); *City of Chester v. Klutznick*, No. 80-3309 (E.D. Pa.); *Ferre v. Klutznick*, No 80-2933 (S.D. Fla.); *City of Duluth v. Klutznick*, No. 5-80-150 (D. Minn.); *City of Atlanta v. Klutznick*, No. C-80-1685A (N.D. Ga.); *Massachusetts v. Klutznick*, No. 80-2232-Z (D. Mass.); *City of Owensboro v. Klutznick*, Civ. No. 80-0201-0(J) (W.D. Ky.); *Carey v. Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. Dec. 22, 1980), *appeal argued*, No. 81-6042 (2d Cir. Feb. 20, 1981); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), *appeal argued*, No. 80-2785 (3d Cir. April 24, 1981); *Carey v. Klutznick*, 503 F. Supp. 874 (N.D. Ill. 1980), *appeal dismissed*, N. 80-2375 (7th Cir. Dec. 31, 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *appeal docketed*, No. 80-1751 (6th Cir. Dec. 24, 1980), *stay* granted, No. A-533 (U.S. Dec. 24, 1980); *McNichols v. Klutznick*, No. 80-C-1151 (D. Colo., Sept. 17, 1980), *rev'd*, No. 80-2023 (10th Cir. April 17, 1981); *City of Cincinnati v. Klutznick*, *No. C-1-80-475* (S.D. Ohio), dismissed Sept. 11, 1980); *City of Baltimore v. Klutznick*, Civ. No. Y-80-2196 (D. Md.), dismissed Aug.

This is an appeal from a judgment of the United States District Court for the Southern District of New York in an action alleging undercounts in the State and City of New York. The judgment orders the Census Bureau to adjust population figures for the State and City "in a reasonable and scientific manner" and to report to the court within thirty days the Bureau's plan to effectuate the court's ruling.[11] For reasons hereafter assigned, we reverse and remand for a new trial.

Although the census is the delight of statisticians and sociologists and serves as a convenient measuring stick for the dispensing of federal funds, it was not created for those purposes. Its purpose under the Constitution was to determine the apportionment of Representatives among the States. "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . ."[12] In reviewing the judgment on appeal, it is important that we keep this basic constitutional purpose in mind.

The House of Representatives has 435 members, and this number must be apportioned among the fifty States.

29, 1980); *Holland v. Klutznick*, No. 80-73302 (E.D. Mich.); *Shapiro v. Klutznick*, No. 80-2638 (D.N.J. Aug. 29, 1980), *aff'd mem.*, No. 80-2466 (3d Cir. Dec. 1, 1980), *stay granted*, 49 U.S.L.W. 3442 (U.S. Dec. 9, 1980) (No. A-490), *cert. granted*, 49 U.S.L.W. 3799 (U.S. April 27, 1981) (No. 80-1436); *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) (three-judge court), *appeal dismissed*, 48 U.S.L.W. 3820 (U.S. June 17, 1980), *aff'd per curiam*, No. 80-1246 (D.C. Cir. Nov. 6, 1980), *cert. denied*, 49 U.S.L.W. 3710 (U.S. March 23, 1981) (No. 80-975).

11 The judgment also prohibited the Bureau from certifying New York population totals to the President until the Bureau had fully complied with the judgment. This portion of the judgment was stayed by order of the United States Supreme Court. *Klutznick v. Carey*, 49 U.S.L.W. 3466 (U.S. Dec. 30, 1980) (No. A-567).

12 Art. 1, § 2, cl. 3; *see also* U.S. Const. amend. XIV, § 2; 2 U.S.C. § 2a(a).

If one State gains a member, another must lose one. Following the 1960 census, seven States each gained one seat, one State gained four, and one gained eight. As a result, twelve States each lost one seat, three States each lost two seats, and one State lost three seats.[13] Following the 1970 census, three States each gained one seat, one gained three, and one gained five. Seven States each lost one seat, and two States each lost two seats.[14] In effect, House membership is a fund in which fifty States have an interest. No State's share can be increased without adversely affecting at least one other State. The question presented by litigation such as the one now before us is whether one State can be granted such an increase without full consideration having been given to its effect on other States.

Persons "who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience" are traditionally considered to be indispensable parties.[15] Equity suggests that a person be brought into the litigation if the case cannot be decided on its merits without prejudicing his rights.[16] This not only prevents possible injury to the absent person; it

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13 U.S. Dep't of Commerce, *Congressional District Data Book* xi (1963).

14 U.S. Dep't of Commerce, *1972 Statistical Abstract of the United States* 363 (93rd ed. 1972).

15 *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 52 (1954), quoting *Shields v. Barrow*, 17 How. 129, 139 (1854).

16 *Sandobal v. Armour & Co.*, 429 F.2d 249, 257 (8th Cir. 1970); *Gramatan-Sullivan, Inc. v. Koslow*, 240 F.2d 523, 525 (2d Cir.), *cert. denied*, 353 U.S. 958 (1957); Fed. R. Civ. P. 19(a).

avoids multiplicity of suits and the danger of inconsistent decisions.[17]

Although the present action has already been before this Court on an appeal from a preliminary injunction order, we did not consider any of the factors just set forth. The panel hearing that appeal held only that plaintiffs have standing to sue and that the issue of census mismanagement is justiciable rather than political.[18] The panel did not address appellants' contention that the issuance of the preliminary injunction order was an abuse of discretion because it "overlook[ed] the impact on other cities and states."[19] The panel concluded that "[t]he argument that a court decision may provide special treatment for the parties involved is one for the ultimate trial on the merits and decision on appeal."[20] We have now reached that point in the litigation.

We think it clear beyond cavil that a statistically formulated increase in the population of only one State, such as New York, will have an adverse effect on other States

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17 *See Ward v. Louisiana Wildlife & Fisheries Commission*, 224 F. Supp. 252, 256 (E.D. La. 1963), *aff'd*, 347 F.2d 234 (5th Cir. 1965). Because the financial and political effects of population apportionment make it a competitive process, the proper method of determining disproportionate undercount would seem to be on a State vs. State basis, rather than that of State vs. national average. If statistical adjustments are to be made, they should be made in all States where needed and in a uniformly fair manner. This is not apt to occur when claims of disproportionate undercount are made in fifty separate cases, particularly when there is no consensus among the experts as to feasible and accurate methods of adjusting undercounts.

18 *See Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), *stay granted*, 49 U.S.L.W. 3466 (U.S. Dec. 30, 1980) (No. A-567). Despite appellant's urgings, this panel considers itself precluded from reexamining the issues passed on by the prior panel.

19 637 F.2d at 839.

20 *Id.*

which are entitled to, but do not receive, the benefit of a similar adjustment. Even if the increase is insufficient to change House membership, it will nonetheless increase New York's share in the numerous revenue sharing plans that are tied into the census. The adversely affected States therefore fall within the category of parties who should be joined in the instant litigation if feasible.[21] Because compulsory joinder of all fifty States was not feasible in the district court, pragmatic equitable alternatives should have been considered.[22]

The first alternative, which the prior panel of this Court has already rejected, would have been to substitute Bureau and congressional review for that of the court.[23] This is the recommendation of the Association of the Bar's Special Committee on Empirical Data in Legal Decision Making which concludes its report with the following observation:

> The path to a better census is more likely to be found in scrutiny of Bureau procedures by the Bureau itself, Congress, other federal agencies, and interested professional groups than in litigation to compel adjustment.[24]

A second alternative would have been to require that notice of suit be given to all of the States, with permission

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21 *Providence Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968).

22 *Id.* at 106-07.

23 The existence of half-a-hundred separately-sued legal challenges to the 1980 census, *see* note 10, *supra*, indicates that there may be a basic defect in the procedure for census review. If the courts cannot correct this situation, it may be wise for Congress to do so.

24 *See Undercount of the Census*, *supra* note 7, at 47.

to intervene given any State which felt that its interests were imperiled. Apparently, no notice was given anyone; only the County of Suffolk sought intervention, and its application was denied.

A third alternative would have been to seek multidistrict coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. It appears that thirty-one of the above listed actions have been transferred to the District of Maryland for coordinated or consolidated proceedings.[25] The wisdom vel non of adopting a uniform nationwide method of making statistical adjustments might perhaps be fully explored if complete multidistrict joinder were agreed upon.

As a fourth alternative, the district court could have stayed the operation of its judgment pending a definitive appellate ruling as to whether the Census Bureau's conduct of the 1980 census could properly be challenged in fifty separate and unrelated actions and whether the requirements imposed on the Bureau by the district court in this action were proper.[26]

Without passing on the wisdom or necessity of any of the foregoing alternatives, we conclude that, at the very least, the district court was required to conduct the trial in such a manner that the interests of other States and subordinate government bodies were not prejudiced by rulings that prevented a full and fair development of the facts. Because error and prejudice resulted from certain of the district court's discovery orders and the sanctions

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25 *In re 1980 Decennial Census Adjustment Litigation*, 506 F. Supp. 648 (J.P.M.D.L. Jan. 16, 1981).

26 *See Providence Tradesmens Bank & Trust Co. v. Patterson, supra*, 390 U.S. at 115.

imposed in connection therewith, for this reason, if for no other, there must be a new trial.

As part of their pretrial discovery, plaintiffs requested disclosure of the Master Address Registers for New York City and every other municipality in the State, together with a listing of all the vacant housing units in every New York State municipality. The Master Address Registers contain information based upon interviews and questionnaires and include data as to householders, house members, street names, apartments or unit numbers, descriptions of location, numbers of units, numbers of persons, etc. The Census Bureau estimated that there are more than 550,000 pages of address registers for the New York region alone. The vacant housing forms, known as D-160 Unit Status Review forms, contain information as to the vacant or occupied status of a unit, as obtained from the owner, custodian, manager, a neighbor, or another individual with knowledge. Between 500,000 and 600,000 D-160 forms are estimated to exist for the New York region. The Bureau took the position that the requested information was confidential, that its disclosure would violate 13 U.S.C. § 9 and would undermine the public confidence needed for the effective conduct of the census.[27]

The district court directed the Bureau to produce the documents in question, the court's sole concession to the Bureau's claim of confidentiality being the grant of permission to redact "only" the names of persons residing in a household. The court ordered that any person granted access to the documents should be sworn to confidential-

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[27] The Bureau did offer, however, to produce D-388 forms, which consisted of page-by-page summaries of all of the D-160 forms, including total housing units, vacant units, unclassified units and population counts on a block-by-block basis.

ity pursuant to 13 U.S.C. § 23(c).[28] Upon the Bureau's refusal to comply with the production order, the district court precluded the defendants from offering any evidence to prove "any fact, matter or circumstance that would be reflected in or could be derived from the [Master Address Registers or D-160 forms] or that could be contradicted or impeached by such documents." Defendants were also precluded from "denying or offering evidence or testimony to disprove" the following allegations in plaintiffs' complaint:

> (a) that there was a disproportionate undercounting of Blacks, Hispanics, other racial and ethnic minorities, legal and illegal aliens, persons whose principal language is other than English and persons living in poverty or high-crime urban areas;
>
> (b) that the persons above described live in New York State or New York City in substantially disproportionate numbers as compared to the nation as a whole; that therefore the undercount for New York will be substantially higher in percentage terms than it will be for the rest of the United States and in absolute numbers it will be larger than the undercount for any other State;
>
> (c) that the 1980 census operations in New York, and particularly in New York City, have been carried out in a manner that will greatly exacerbate the un-

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28 Section 23(c) provides that the Secretary of Commerce may utilize a temporary staff to assist the Census Bureau in performing its work, but only if such temporary staff is sworn to observe the limitations imposed by 13 U.S.C. § 9. It would appear that if plaintiffs' attorneys are sworn to confidentiality pursuant to the provisions of this section, they will be in the enviable, but legally uncomfortable, position of becoming part of the Bureau's temporary staff.

dercount in New York as compared to other parts of the nation;

(d) that the particular difficulties encountered by the Census Bureau and the poor management of census operations in New York State, and especially New York City, have made judicial relief essential;

(e) that the Census Bureau with knowledge of the difficulties it would encounter in New York State and New York City and with knowledge that undercounting would be disproportionately severe there, especially among the class described in paragraph (a) above, knowingly and intentionally failed to devote adequate resources to develop special plans and procedures, to assign the most qualified personnel and to carry out their own planned procedures in New York State, and particularly New York City;

(f) that the first follow-up operations in New York State and New York City were also seriously mismanaged (Six paragraphs, covering four printed pages in the Appendix, set forth alleged examples of mismanagement under this general allegation of wrongdoing);

(g) that the second follow-up operations were not being adequately staffed or managed in New York; they were not designed to count additional households, correct inaccuracies in the size of households, or to recheck the casual count inaccuracies;

(h) that the local review program was being improperly conducted by an inadequate staff and the City had been given neither adequate time nor adequate information to review and challenge the results.

Looking first to the discovery order, we conclude that it was improvidently granted. In *McNichols v. Klutznick*, No. 80-2023 (10th Cir. April 17, 1981), one of the actions pending in other jurisdictions, the district court had granted the identical relief ordered by the court below. The Court of Appeals reversed, stating that "[b]oth the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality."[29] Although the Third Circuit appears to have taken a contrary position,[30] we agree with the holding of the Tenth Circuit.

Assuming for the argument, however, that the court below did not err in granting discovery, it clearly abused its discretion in the imposition of sanctions. As already pointed out, New York is seeking to gain an advantage over other States in the competition for congressional seats and federal funds. The extremely broad sanction order punished these unrepresented States by preventing full and fair disclosure of the facts and an adjudication on the merits of plaintiffs' claims.[31] The severity of sanctions should be tempered by a consideration of the equities involved.[32] The equities in the instant case dic-

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29 *McNichols v. Klutznick*, No. 80-2023, slip op. at 3-4 (10th Cir. April 17, 1981). See *Seymour v. Barabba*, 559 F.2d 806, 807-08 (D.C. Cir. 1977), where the court said that the provisions of section 9(a) are a "flat barrier to disclosure with no exercise of discretion permitted."

30 *Shapiro v. Klutznick*, No. 80-2466 (3d Cir. Dec. 1, 1980) (mem.), *cert. granted*, 49 U.S.L.W. 3799 (U.S. April 27, 1981) (No. 80-1436).

31 Because of the sweeping effect of the district court's sanction, we are not even told what New York City's census count was.

32 *Williams v. Krieger*, 61 F.R.D. 142, 145 (S.D.N.Y. 1973).

tated that the unrepresented States not be penalized because the Census Bureau was attempting to recognize the public's interest in a confidential census.

Reversed and remanded for further proceedings consistent with this opinion.

STEWART, *District Judge* (concurring in the judgment):

Although I concur in the judgment, I write to express my disagreement with the court's analysis in overturning the order of the district court that the follow-up address registers (FARs) and D-160 Unit Status Review forms be disclosed to the plaintiffs with limitations. I also consider the scope and the effect of the holding overturning the preclusion order.

I.

The statutory privilege raised by appellants as a barrier to disclosure is substantial and undoubtedly necessary. However, I do not believe that the statute under which the government claims an absolute privilege from disclosure is so broad as to protect most of the information sought by plaintiffs from the limited disclosure ordered below.[1]

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[1] As there is no disagreement concerning the relevance of the information to appellees' case, I confine my discussion to the question of privilege. If the information sought is absolutely privileged, or if the information is qualifiedly privileged and the disclosure is not warranted, the discovery order must be reversed. If the information is not privileged, or if the qualified privilege is overcome, the discovery order must be upheld.

A.

The starting point in analyzing the scope of a statutory privilege must be the text of the statute, *see United States v. Missouri Pacific R.R. Co.*, 278 U.S. 269, 277-78 (1929), and the statute must be strictly construed. *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961). The defendants bear the burden of proving that a privilege exists. *Heathman v. United States District Court*, 503 F.2d 1032, 1033 (9th Cir. 1974) (citing 8 Wright & Miller, Federal Practice & Procedure: Civil, § 2016 at 126).

The statute in question provides:

> § 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual.

> Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence, or used for any purpose in any action, suit, or other judicial or administrative proceeding.

13 U.S.C. § 9(a) (1976). Appellants contend that the statute extends confidentiality to "all information or data provided to the Census Bureau under the Act." Appellants' Br. at 53-54.[2] The opinion of the court merely endorses the holding of the Court of Appeals for the Tenth Circuit that "the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality." Slip op., *supra*, at 11, *quoting McNichols v. Klutznick*, No. 80-2033, slip op. at 3-4 (10th Cir. March 17, 1981), *petition for cert. filed sub nom., McNichols v. Baldridge*, 49 U.S.L.W. 3826 (U.S. April 24, 1981) (No. 80-1781). The express terms of the statute are not so broad. Subsection 9(a)(1) limits the use of "information furnished under the provisions of this title" to statistical purposes. This provision recognizes the purpose of the census as merely gathering sociological data rather than enabling law enforcement or dictating substantive policy. Subsection 9(a)(2) protects the confidentiality of respondents in the enumerated population by prohibiting dissemination of information identified with "any particular establishment or individual" beyond offi-

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[2] Citations to the briefs of the parties will be recorded as "Appellants' Br. at . . .", "Appellees' Br. at . . .", and "Appellants' Reply Br. at . . . ." The Joint Appendix Volumes I-X are referred to by page number as "A. . . . ."

cers or agents of the Department of Commerce or the Bureau. This is also consistent with the benign, data gathering function of the census. Subsection 9(a)(3) is more restrictive than § 9(a)(2), limiting access to individual reports to "officers and employees of the Department or bureau." Thus, the express protection of the statute is circumscribed: (1) census information is to be used only for statistical purposes; (2) no one may publish information which identifies respondents; and (3) no one without statutory authority may peruse individual reports.

Moving beyond the language of § 9, its legislative history does not support appellants' all-embracing interpretation. Appellants identify as indicative of the "strong congressional intent against all disclosure" the swift reaction of Congress to the decision of the Supreme Court in *St. Regis Paper Co., supra.* Appellants' Br. at 51 n.*. The Court had decided that, as written, § 9 did not protect copies of census questionnaires voluntarily retained by respondents. 368 U.S. at 218. Within one year Congress adopted the flush language following § 9(a)(3)[3] to overrule *St. Regis Paper Co.* The legislative history pertaining to the amendment shows its limited purpose.

> The purpose of this legislation is to provide specifically that company-retained copies of census reports submitted to the Bureau of the Census shall have the same confidential status which is afforded to the original census reports . . . .

S.Rep. No. 2218, 87th Cong., 2d Sess. 2 (1962), *reprinted in* [1962] U.S. Code Cong. & Ad. News 3188, 3189. The Department of Commerce request for enactment of this

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3 The text of the statute appears at pp. 1-2, *infra.*

measure stated that, with the requested amendment, " . . . a respondent will be free to give information to Census for statistical purposes only, without fear that a copy of the return can be demanded by a regulatory agency and used against the respondent." Letter from Secretary of Commerce Luther H. Hodges to President Lyndon B. Jonson, *reprinted in* [1962] U.S. Code Cong. & Ad. News 3190, 3191. The relationship between respondents and the Bureau is repeatedly emphasized in Secretary Hodges' letter. *Id.* The statutory response to *St. Regis Paper Co.* was thus confined to the narrow holding of the case.

Although the *St. Regis* Court was specifically concerned with the relative protection afforded census forms retained by respondents and those held by the Census Bureau, the Court stated that "the prohibitions against disclosure contained in § 9 . . . do not purport to generally clothe census information with secrecy." 368 U.S. at 217-18. The Court analyzed each of the three subsections of 13 U.S.C. § 9 in the same manner as I have done here. *Id.* at 215-16. The strict construction given to § 9 by the Supreme Court did not occasion any fundamental rethinking or clarification of the statute. The statute could have been amended to include a blanket prohibition on dissemination of the information obtained by the Bureau from any source, for any purpose. It was not so amended. In fact, the Committee on Post Office and Civil Service of the House of Representatives expressly rejected a statutory revision that would prevent use of "all copies of [census] information, reports and other data" in judicial and administrative proceedings. H.R. Rep. No. 2437, 87th Cong., 2d Sess. 1-2 (1962). *See also* H.R.Rep. No. 10569, 87th Cong., 2d Sess. (1962), printed in Hearing Before the Comm. on Post Office and

Civil Serv., Confidentiality of Census Reports, 87th Cong., 2d Sess. (1962).

The limitation of confidentiality to information furnished to the Bureau by census respondents was emphasized in an early predecessor to § 9 which authorized the Director of the Census to collect and publish statistics relating to cotton seed. *See* Act of Aug. 7, 1916, Pub.L. No. 64-177, ch. 274, § 2, 39 Stat. 436 (1916) ("1916 Act"). The 1916 Act provided "[t]hat the *information furnished by any individual establishment* under the provisions of this Act shall be considered as strictly confidential and shall be used only for the statistical purpose for which it is supplied." *Id.* (emphasis added).

I also derive support for this interpretation of § 9 from the express language of 13 U.S.C. § 8, a statute empowering the Secretary of Commerce to make certain disclosures subject to the limitations of § 9. Subsection 8(b) permits disclosure of tabulations or statistical materials "which do not disclose the information *reported by, or on behalf of, any particular respondent.*" *See McNichols v. Klutznick, supra,* slip op. at 5 (emphasis added), *petition for cert. filed sub nom., McNichols v. Baldridge,* 49 U.S.L.W. 3826. Subsection 8(b) is entirely consistent with § 9(a) in seeking to protect the identity of census respondents. Subsection 8(c) illustrates another means of protection for census respondents. The information furnished to any respondent or government unit under § 8 may not "be used to the detriment of any respondent or other person to whom such information relates." 13 U.S.C. § 8(c) (1976).

I can only conclude that the privilege conferred by § 9 is not as broad as the court's opinion states. Nonetheless, the express language of the statute amply protects the confidentiality interests of census respondents and pro-

motes the purposes of accurate enumeration of the population. *See In re FTC Corporate Patterns Report Litigation*, 432 F.Supp. 291, 305 (D.D.C. 1977), *aff'd sub nom. Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 699 (D.C. Cir. 1978).

Broadening our search for the limits of the statutory privilege conferred by 13 U.S.C. § 9(a) to include judicial construction of the statute does not materially alter this picture of substantial, but finite, confidentiality. Defendants rely heavily on *Seymour v. Barabba*, 559 F.2d 806 (D.C.Cir. 1977) (per curiam), for the absolute confidentiality of matter gathered by the Bureau, whether or not the data is reported to the Bureau by census respondents. *Seymour* held that the Bureau did not have to disclose to third parties the names and addresses of companies falling within 21 of the Bureau's "standard industrial classifications." *Id.* at 809. The information was sought to notify potential class members of an antitrust suit. Plaintiff argued that the names and addresses were not furnished under the Census Act and were not gathered for statistical purposes. With respect to the latter point, the opinion reasoned that names and addresses are "sufficiently related to the statistical data which the firms eventually are called upon to report that it is protected under Section 9(a)(1)." *Id.* The statistical purpose of collecting names and addresses for standard industrial classifications is apparent: it permits cross-checking data to avoid double counting while ensuring completeness. To the extent that the *Seymour* Court found names and addresses could not be disclosed without violating the statutory proscription of use of "information furnished under this title" for other than statistical purposes, I agree with its holding. I cannot agree with *Seymour*, however, that information "gathered," "categorized and

assembled" for the Bureau, but not reported by census respondents, acquires statutory protection. My reading of the statute and its purpose, as described above, of ensuring respondents' privacy, leads to the conclusion that "information furnished under the provisions of this title" means information obtained from the enumerated population.

This latter construction was adopted by Judge Weinfeld in *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958). Judge Weinfeld found that the "clear and unambiguous" purpose of the statute "was to protect [citizens] who complied with the command of the statute." *Id.* at 570. *United States v. Littles*, 321 F.Supp. 388 (D.Del. 1971), also focussed on the origin of the census data and its use, not merely on the Census Bureau as the repository of any information:

> . . . [T]he information obtained by the census questionnaire is strictly confidential. 13 U.S.C. § 9. It may not be used other than for statistical reporting, and may never be disclosed in any manner so as to identify any individual who has answered the questions.[4]

Id. at 392. In *Littles*, the court declined to dismiss an information charging the defendant with refusal to answer census questions. *Id.* The court relied on the statutory privilege protecting respondents' confidentiality in denying defendants' claim that the census questionnaire was an unconstitutional invasion of privacy.

See also Doe v. McMillan, 459 F.2d 1304, 1326 n.15 (D.C.Cir. 1972) (Skelly Wright, C.J. dissenting), *rev'd in part, aff'd in part, and remanded*, 412 U.S. 306 (1973) (Census Act "forbids public dissemination of information obtained by census takers").

B.

It remains to assess the discovery order in this case in light of the specific and limited provisions of 13 U.S.C. § 9(a). The discovery order provided:

> [T]hat [appellants] shall produce to [appellees] by September 10, 1980, the FARs for the City and State of New York for use in checking the accuracy of [appellants'] conduct of the 1980 decennial census except that as to those Census Bureau District Offices in New York State which have been closed or from which FARs have been removed by the Census Bureau, the FARs for those offices shall be produced to the [appellees] by September 12, 1980; and it is further
>
> ORDERED that [appellants] shall produce to [appellees] by September 10, 1980, for use in checking the accuracy of [appellants'] conduct of the 1980 decennial census:
>
> (a) all lists compiled by the Census Bureau of vacant or nonexistent household units in the City and State of New York; and
>
> (b) all Census Bureau D-160 forms for housing units in the City and State of New York other than those indicating that the household unit is occupied; and it is further
>
> ORDERED that [appellees] and their attorneys shall use the documents produced pursuant to this order solely for the purpose of helping to ensure an accurate count of the whole number of persons in New York in the 1980 decennial census, and such documents shall not be used or disclosed to any other

person for any other purpose whatsoever; and it is further

ORDERED that any person granted access to the documents produced pursuant to this Order shall be sworn to confidentiality pursuant to 13 U.S.C. § 23(c); and it is further

ORDERED that in producing the documents required herein, [appellants] may redact such documents to remove from them only the names of persons residing in any household enumerated in the 1980 decennial census; and it is further

ORDERED that [appellants'] motion for a protective order is granted to the extent provided herein, and is in all other respects denied; . . . .

A.281-83.

I turn first to the FARs. The FARs at issue were completed in six steps. First, addresses were purchased from the commercial mailing firms "that supplied the best list for the area." A.437. That included 2,279,000 addresses. A.449. Second, because the commercial lists ("TARs") were known to be deficient, the TARs were compared to the 1970 census address list and 255,000 addresses were added. A.437, 449. Third, the addresses were printed on post cards and checked by the Post Office for address correction, duplication, business only, undeliverables and address missing. A.437. This added 458,000 addresses. A.449. Fourth, in a "precanvass" operation, enumerators checked the special address registers in the field to verify the accuracy of addresses, to identify missing units and to correct geographic errors. A.437. Precanvass added an additional 219,000 addresses to the master mailing lists. A.449. Fifth, another round of

postal checks followed. A.437. Sixth, the FARs were up-dated after questionnaires were mailed out and either mailed back or answered by a personal visit or answered by the enumerators if no response was obtained. A.266-267.

It follows from the foregoing analysis of the statutory privilege that information obtained at the first, third, fourth and fifth steps is not privileged.[5] Most importantly, the information sought at these steps was not supplied by census respondents. It is also significant that the information was to be used only for statistical purposes—according to appellees' representations, A.270, and the express terms of the discovery order, A.282. There was no dissemination of information that identified any respondent. The names of persons residing in any enumerated household were to be redacted. A.282-83. There was no evidence that the respondent was otherwise identified on the address registers. Appellees did not seek and the district court did not grant access to individual reports. Also, under the protective aspects of the order, persons granted access to the documents were ordered not to disclose or use the FARs "for any other purpose whatsoever," and were sworn to confidentiality.

At the second and sixth steps, however, the statutory privilege may apply, as information furnished by respondents is sought. However, the statutory privilege is not absolute. The information furnished by respondents may be disclosed for statistical purposes as long as respon-

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[5] Indeed, it would be far-reaching to assert a privacy interest in an address that is voluntarily disclosed to the post office or a retail establishment and which is utilized to receive mail. Privacy protection does not extend to information that a person voluntarily and knowingly exposes to the public. *See, e.g., Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 455-59, 465 (1977); *United States v. Miller*, 425 U.S. 435, 442 (1976); *Katz v. United States*, 389 U.S. 347, 351 (1967).

dents are not identified and the individual reports are not disclosed. *See* text at app. 2-5, *supra*. So "[t]he potential harm from disclosure of any communication subject to a privilege must be weighed against the benefits of disclosure." *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 390 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); *see United States v. IBM*, 1975-2 Trade Cases, ¶ 60,383 (S.D.N.Y. 1975). It is appropriate in determining the availability of a privilege to consider protective orders tailored to the case at hand. *Carr*, 431 F.2d at 390, *cert. denied*, 400 U.S. 1000. The district court heard argument and considered counsel's submissions before ordering disclosure. The disclosure order recited the competing considerations. The order was crafted to satisfy both the letter and intent of § 9(a). The information was sought only for statistical purposes and the disclosure order prohibited dissemination of information identifying census respondents. Access to the individual reports was never at issue. It was not an abuse of discretion to comply fully with the statutory privilege and order the FARs produced subject to a protective order.

In reviewing the disclosure order of the district court relative to the D-160s "other than those indicating that the household unit is occupied," we first determine what data is contained in D-160s. In addition to the address and vacant condition of the unit, D-160s specify the name of the person providing the information. A.320. This information is supplied by both census employees and respondents who are not residents of the vacant units. The protective order only permitted the Bureau to redact from the documents the names of residents of enumerated households. As disclosure of the D-160s would identify the individual respondents, who may not be census employees, such disclosure would violate § 9(a)(2)

as construed above. As the disclosure order with respect to the D-160s inadequately protected the confidentiality of census respondents the order was erroneous.

I conclude that 13 U.S.C. § 9 is not as broad as claimed by appellants, but that it does reach some matter ordered disclosed by the district court.

II.

Following the discovery order, the Census Bureau persisted in its claim of privilege. The district court certified its disclosure order to this court and stayed the production order. Following the October 1, 1980 order by this court denying review, appellees sought a preclusion order under Fed.R.Civ.P. 37(b)(2) for appellants' failure to comply with the disclosure order.

Our review is limited, of course, to determining whether the preclusion order was an abuse of discretion. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) (per curiam). There are several novel considerations in issuing sanctions against government officials for failure to permit discovery: (1) the significance of an abuse of discretion is magnified by the importance of the issue and the status of the noncomplying party; and, (2) issue-related sanctions are ordinarily sufficient. *See In re Attorney General of the United States*, 596 F.2d 58, 65 (2d Cir. 1979). As the opinion of the court emphasizes, the unique nature of this case bears out the importance of limited and necessary sanctions. Nonetheless, the district court found that a preclusion order was appropriate in light of appellants' "knowing and wilful" noncompliance with the discovery order. There is no contention, however, that appellants' reticence was a matter of bad faith, and the district court did not so find.

I agree with the rest of the panel that the preclusion order was overly broad. First, there was ample evidence already made available by appellants that contained essentially the same information as contained in the FARs. The Bureau was producing Form 388s, which contained the total population and housing unit figures from the address registers for each enumeration district. A.352. The 388s also provide totals of vacant housing units. *Id.* Second, the order effectively determined several issues despite contrary evidence not derived from the FARs or D-160s. For example, there was independent evidence that the undercount in rural areas was greater than the undercount in urban areas, A.635, that could not be offered at trial to rebut the plaintiff's case as a result of the preclusion order. This was a matter of historical fact unrelated to issues of the present undercount in New York and the claims of mismanagement, but tending to disprove appellees' claim. Third, the FARs and D-160s were not necessary to prove several of the claims that were included in the preclusion order. Paragraphs 47(a) and 47(b) of the complaint, for example, allege that inadequate staffing and procedures constituted mismanagement that exacerbated the undercount. The extent of the staffing and the adequacy of procedures are not proved or disproved by anything in the FARs or D-160s.

The court's opinion implies that the district court did not adequately consider the interests of other states as claimants to both the representational and budgetary pies. Clearly the case requires consideration of the interests of other states. But this appeal concerns primarily the issue whether the decision concerning discovery and the subsequent preclusion order as a sanction for failure to permit court ordered discovery was tailored to the facts of the case. I do not agree with the court's opinion that

"[t]he question presented by litigation such as the one now before us is whether one state can be granted such an increase [in congressional representation] without full consideration having been given to the effect on other states." Slip op., at 6. The interests of other states are not, strictly speaking, implicated until different types of relief are being considered, although a decision on the merits regarding both the claimed undercount and mismanagement is highly desirable. From a practical standpoint, I am not at all sure whether the court's opinion proposes to consider other states' interests in a manner that is any different from the adopted course of the district court. The entire panel apparently believes that it is possible to conduct the trial in this case, even though only one state is involved, so long as there is no prejudice to the rights of others. The district court order provided that any appropriate relief should be formulated by the Census Bureau in a manner that safeguards the absent interested parties. A.41-42. The Bureau, and not the district court, must initially bear the responsibility of formulating equitable relief if such relief is warranted.

III.

In sum, I find the express language of 13 U.S.C. § 9(a), as well as its legislative history and case interpretation, to support a narrower privilege than that advanced by the appellant and accepted by the majority. However, the district court's disclosure order did not meet the command of the statute. I also find that the preclusion order was not tailored to the conduct or information at issue. Accordingly, I concur in the judgment.

APPENDIX B

STATE OF MICHIGAN,)
) ss.:
COUNTY OF WAYNE ,)

PATRICIA COUSENS BECKER, being duly sworn, deposes and says:

1. I am the head of the Data Coordination Division, Planning Department of the City of Detroit. I have been an employee of the City of Detroit since January 1968. Throughout my tenure with the City my primary responsibility, along with my staff, has been to compile, analyze and disseminate demographic, socio-economic and physical data regarding the City of Detroit. In the course of my professional duties, I have become familiar with the operations of the Census Bureau and with the data it produces. I am the author of several articles on topics related to the census, I am the Chairperson of the Detroit Regional Census Advisory Committee, and I was a member of the Panel on Decennial Census Plans which prepared the 1978 report of the National Acadmey of Sciences entitled Counting the People in 1980: An Appraisal of Census Plans.

2. As part of my responsibilities, I monitored Census Bureau operations in Detroit during the 1970 Census. During the latter part of July 1970, I and several other local officials expressed concern to the Census Bureau

that there had been significant omissions in census coverage in Detroit.

3. In response to these expressions of local concern, the Census Bureau made its address registers for certain areas of the City available to employees of the City of Detroit in order to permit a check for omitted housing units. Three Detroit employees, Julie Sabit from the City Plan Commission, Gary Sands from the Mayor's Committee for Community Renewal, and I were sworn to confidentiality pursuant to 13 U.S.C. § 23(c). Thereafter, on August 1, 1970, Julie Sabit and I went to a Census Bureau District Office in Detroit and compared the Bureau's address registers against lists of housing units prepared by the City. Subsequently, a letter was sent to the Census Bureau by Homer Hall, then Acting Director of the Mayor's Committee for Community Renewal, reporting the omissions discovered through our review of the address registers. A copy of Mr. Hall's letter, dated August 4, 1970, is attached hereto as Exhibit A. A copy of a responsive letter from Robert G. McWilliam, Acting Regional Director, Bureau of the Census, dated August 13, 1970, is attached hereto as Exhibit B.

Patricia C. Becker
Patricia Cousens Becker

Sworn to before me this
4th day of December, 1980.

Linda Mary Cirlek
Notary Public
Wayne County 10-9-83
Michigan

Exhibit A To Becker Affidavit

City of Detroit
ROMAN S. GRIBBS, Mayor

HOMER HALL
Acting Director
MILTON ROGUCKI
Assistant Director

MAYOR'S COMMITTEE FOR COMMUNITY RENEWAL
1302 City-County Building
Detroit, Michigan 48226
963-1012

August 4, 1970

Mr. Hobart Yerkey
Regional Director
Bureau of the Census
2100 Washington Blvd. Building
234 State Street
Detroit, Michigan 48226

Dear Mr. Yerkey:

Miss Patricia Cousens and Miss Julie Sabit spent several hours on Saturday, August 1, 1970, working with the address registers in the Detroit East Field Office. Several groups of missed housing units were identified, as follows:

1. In Brewster-Douglass housing project:

637 Watson	649 Watson	661 Watson
639 "	651 "	663 "
641 "	653 "	665 "
643 "	655 "	667 "
645 "	657 "	669 "
647 "	659 "	671 "

633 Watson, Apartments 446-454
635 " " 455-463
609 " " 485-496

Total: 48 Units
Tract: 529
Block: 106

Note: Several other segments of this public housing project were miscoded into the wrong enumeration districts (ED 4211, 4212, 4240 and 4241). Notes were left in the address registers; we have a

duplicate copy of the errors.

2. Palms Apartments, 1001 E. Jefferson; Tract 505, Block 116. This building, with approximately 52 units, is missing altogether.

   Note: Listings on the Chrysler Freeway are miscoded in Tract 505, Block 113. They belong in Tract 505, Block 114. There are also miscodings for Navarre Place in Tract 509; this street is located entirely in Tract 505, Block 113.

3. 3737 Beaubien (Tract 533, Block 106). This place is a residence for interns and residents at Harper Hospital. It contains 47 apartments and 96 sleeping rooms for a total of 143 separate housing units. It was enumerated as a group quarters with 61 people; Mr. McGrath of the Detroit East Office agrees that this is an error. At full occupancy, the place probably houses around 200 people.

4. Park Shelton, 15 E. Kirby (Tract 545, Block 206). Apartments 610 and 1023 through 1031 were missed, totalling 9 units.

Would you please let me know by Monday, August 10th, what action you plan to take regarding these particular missed addresses.

In the course of our work with the address registers and other materials, we determined that a large number of addresses, while not absolutely missing, are erroneously geocoded. We understand that these errors, as they were identified by the field offices, were noted and forwarded to Washington for correction by the Geography Division. We would like to know what procedure will be followed to insure that the corrections will be made to the address register, so that the published data (in print or on summary tapes) will be correct for small areas.

Because of the point in time at which we gained access to the address registers, we were able to work only in one field office, covering 20 to 25 percent of the City. Had we been able to make similar checks in the other areas, we feel certai

like errors would have been found. In particular, we suspect errors in the Jeffries and Parkside public housing project.

We appreciate the opportunity to have had City staff members deputized so that they were able to examine the Census records, and feel much more confident in our understanding of the field procedures used in the 1970 Census. We look forward to recovering the results of further field work in the outlined problem areas. Finally, let us hope that in the future we can work together more closely from the beginning of a project in an effort to obtain the best possible data.

Sincerely,

Homer Hall
Acting Director

HH:hm

cc: Mr. Ted McGrath, Director
Detroit East Field Office

Mr. William T. Fay, Chief
Geography Division

Exhibit B to Becker Affidavit

DEPARTMENT OF COMMERCE

August 11, 1970

Mr. Bruce Hall
Acting Director
Mayor's Committee for Community Renewal
302 City - County Building
Detroit, Michigan 48226

Dear Mr. Hall:

This is in response to your letter of August 4, 1970 regarding the findings of Miss Patricia Cousens and Miss Julie Sabit when they worked recently with the Census materials.

The addresses they were unable to locate will be checked out and any that are found to be missing will be added to our lists and enumerated. You will be advised of the results of this check.

Published Census data both in print and on summary tapes will be based on a tabulation of Census questionnaires. Each questionnaire is coded to tract and block. The computers will be programmed to correct those questionnaires erroneously geocoded. Since the address registers will not be used in the tabulations, it will not be necessary to move addresses from one address register to another to insure accurate Census data.

I am glad to learn of your increased confidence in Census procedures resulting from Miss Cousens and Miss Sabit's visit. If the Bureau can be of further assistance, please let me know.

Sincerely,

ROBERT G. MARKLEY
Acting Regional Director

Best Copy Available